

United States
16
Circuit Court of Appeals

For the Ninth Circuit.

A. B. HUMPHREY COMPANY, a Corporation,
Appellant,

vs.

BEN H. ARKELIAN and BEN H. ARKELIAN
& CO., a Copartnership,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
Southern Division.

FILED

FEB 20 1920

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

A. B. HUMPHREY COMPANY, a Corporation,
Appellant,

vs.

BEN H. ARKELIAN and BEN H. ARKELIAN
& CO., a Copartnership,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amendment to Answer to Bill of Complaint for Infringement of Registered Trade- mark	27
Answer of Ben H. Arkelian to Interrogatories Propounded to Defendant by Plaintiff....	12
Answer to Bill of Complaint for Infringement of Registered Trade-mark	15
Assignment of Errors	147
Bill of Complaint for Infringement of Regis- tered Trade-mark	1
Certificate of Clerk U. S. District Court to Transcript of Record	154
Citation on Appeal	155
Condensed Statement of Proceedings Before United States District Court, and Narra- tive of Testimony Pursuant to Equity Rule 75	32
Cost Bond on Appeal	150
Decree	31
EXHIBITS:	
Exhibit "A"—Label Entitled "Enchant- ress Brand" Grapes	26

Index.	Page
Interrogatories Propounded to Defendants by Plaintiff	10
Memorandum Opinion	31
Names and Addresses of Attorneys of Record	1
Order Allowing Appeal	149
Order to Send Original Exhibits to Circuit Court of Appeals	152
Petition for Order Allowing Appeal	145
Praecipe for Transcript on Appeal	153
TESTIMONY ON BEHALF OF PLAIN- TIFF:	
ABRAHAM, L. (In Rebuttal)	131
BABER, EDWARD I. (In Rebuttal)....	112
Cross-examination	113
Redirect Examination	117
BUCKLEY, JERRY	74
Cross-examination	75
HUMPHREY, A. B.	34
Cross-examination	42
Redirect Examination	66
Recross-examination	67
Redirect Examination	68
Recalled in Rebuttal	132
Cross-examination	143
LINES, S. A. (In Rebuttal)	122
Cross-examination	123
WINKELMAN, GEORGE	70
Cross-examination	71
Redirect Examination	73

Index.	Page.
TESTIMONY ON BEHALF OF DEFEND- ANTS:	
ARKELIAN, BEN H.	106
Cross-examination	109
Redirect Examination	111
Recross-examination	112
ARKELIAN, K.	96
Cross-examination	97
ARKELL, JOSEPH	103
Cross-examination	104
Redirect Examination	106
COSULICH, MARK	99
Cross-examination	100
Redirect Examination	102
DE JOURNAL, FERNAND	90
Cross-examination	91
Redirect Examination	94
DE JOURNAL, ROBERT	94
Cross-examination	95
SETCHEL, W. FLANDERS	85
Cross-examination	89
In Surrebuttal	144

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

CHAS. E. TOWNSEND and WM. A. LOFTUS,
909-917 Crocker Bldg., San Francisco,
Attorneys for Plaintiff.

W. M. CONLEY, CONLEY, CONLEY & CON-
LEY, Fresno, California,
Attorneys for Defendants.

In the District Court of the United States, for the
Northern District of California, Southern Di-
vision.

IN EQUITY—No. 1951.

A. B. HUMPHREY COMPANY,
Plaintiff,

vs.

BEN H. ARKELIAN and BEN H. ARKELIAN
& CO.,
Defendants.

BILL OF COMPLAINT FOR INFRINGEMENT
OF REGISTERED TRADE-MARK.

Now comes A. B. Humphrey Company, a corpo-
ration, and complaining of defendants above
named, for cause of action alleges:

I.

That the plaintiff during all the times hereinafter
mentioned was and is a corporation duly organized

and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Escalon, County of San Joaquin, and State of California.

II.

That the defendant Ben H. Arkelian, during all the times hereinafter mentioned was and is a resident of the City of Modesto, County of Stanislaus, and State of California. That the defendant Ben H. Arkelian & Co. is a copartnership consisting of Ben H. Arkelian and A. W. Phelps, and having a place of business in the City of Modesto, County of Stanislaus, State of California. [1*]

III.

That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the trade-mark laws of the United States.

IV.

That plaintiff is now the owner of a trade-mark, to wit, "Lady Fingers," for use on grapes, having succeeded to all rights of one A. B. Humphrey, who, on or about September 10, 1895, entered into the business of growing and packing and shipping grapes, under the original and distinctive name of "Lady Fingers," and ever since that time plaintiff and its said predecessor have continuously used said trade-mark in interstate commerce, by affixing the same to boxes or packages containing grapes; that said trade-mark had not been in use by others prior to its adoption and use by plaintiff's prede-

*Page-number appearing at the foot of page of original certified Transcript of Record.

cessors; that through a long course of honorable dealing, and by virtue of the excellent quality of plaintiff's product, said trade-mark "Lady Fingers" has long since come to indicate grapes produced and sold by plaintiff, and a valuable reputation and good-will has been built up under said trade-mark throughout the several states of the United States, which plaintiff would now enjoy exclusively, except for the infringing acts herein complained of.

V.

That so being the owner of said trade-mark, on the 2d day of April, 1924, the said A. B. Humphrey filed in the Patent Office of the United States on said date an application for registration for such trade-mark; said application being in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship; the class of merchandise, and the particular description of goods [2] comprised in such class to which said trade-mark was appropriated; a description of the trade-mark itself, and a statement of the mode in which the same was applied and affixed to goods, and the length of time during which the trade-mark had been used. With this statement was filed a drawing of the trade-mark, signed by the applicant, or his attorney, and such number of specimens of the trade-mark, as actually used, as were required by the Commissioner of Patents. And said A. B. Humphrey paid into the Treasury of the United States the sum of ten dollars, and otherwise complied with

the requirements of the Act of Congress entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several states, or with Indian tribes, and to protect the same," which Act was approved February 20, 1905. Said application was accompanied by a written declaration verified by the said applicant, to the effect that the applicant believed himself to be the owner of the trade-mark sought to be registered, and that no other person, firm, corporation, or association, to the best of the applicant's knowledge and belief, had the right to such use either in the identical form or in such near resemblance thereto as might be calculated to deceive; that said trade-mark was used in commerce among the several states, and that the description and drawing presented truly represented the trade-mark sought to be registered; which said declaration was strictly in accordance with Section 2 of said Act, and duly verified before a proper officer as provided in said Section.

VI.

That thereupon due proceedings were had according to law, and it appearing upon the examination of said application in said Patent Office that said applicant was entitled to have his [3] trade-mark registered under the provisions of the above-mentioned Act, due publication thereof took place, and no notice of opposition being filed thereto, registration of said trade-mark was duly granted according to law, and a certificate of registration was thereafter, to wit, on the 22d day of July, 1924,

issued to the said A. B. Humphrey, which certificate was numbered 186,739, pursuant to Section 11 of the aforementioned Act; which said certificate of registration is still in force, a copy of which is hereunto attached and made a part hereof.

VII.

That plaintiff is, by virtue of an assignment duly executed by the said A. B. Humphrey to said plaintiff on the 6th day of September, 1927, owner of the entire right, title and interest in and to the said trade-mark and the registration thereof, No. 186,739, together with all rights of action and claims for damages and profits thereunto accrued or thereafter accruing, and the good-will of the business in connection with which the said trade-mark was and is used; all as will more fully appear from the original assignment, hereunto attached and made a part hereof.

VIII.

That said trademark and the right to the exclusive use thereof is of great value to plaintiff, and any infringement thereof, or any use of a mark so closely resembling the same as to mislead the public into believing that they are procuring plaintiff's goods when they are not plaintiff's goods will cause irreparable injury to plaintiff, and will deprive plaintiff of the just reward and fruits of its well-earned reputation for fresh or table grapes, by reason of the fact that plaintiff's said grapes have become well and very extensively known by the [4] short designation of "Lady Fingers"; and that by reason of this fact pur-

chasers and the public generally in the purchase of such grapes have come to identify the same as plaintiff's products largely, if not entirely, by reason of the presence upon the label of the words "Lady Fingers," paying little, if any, attention to the color or other characteristics of the various labels, which color and characteristics are subject to change, and present quite a variety of appearances.

IX.

That defendants are sellers of and dealers in grapes; that subsequent to the 22d day of July, 1924, and within the Northern District of California, and in the City of Portland, Oregon, and elsewhere, contriving to injure plaintiff and plaintiff's predecessor in interest in its and/or his business, and to divert to themselves the benefit and advantage which otherwise would have accrued to plaintiff or its said predecessor, from the excellence and popularity of its and/or his said grapes known to the trade as "Lady Fingers," defendants jointly began putting on the market grapes in cartons, boxes, and containers, on which were pasted labels on which the words "Lady Fingers" appeared in prominent type, and sold the same and offered the same for sale as "Lady Fingers," by reason of which said grapes so labelled were calculated to deceive the public and did actually deceive the public in many instances into the belief that in buying defendant's grapes they were buying the grapes of plaintiff or its predecessor, whereby great confusion was created in the market as to the origin of said grapes, to the great damage and injury of plaintiff

and its predecessor, and in infringement of its and his vested rights of trade-mark. [5]

X.

That defendants so sold and offered said grapes for sale and so labelled them in infringement of the registered trade-mark of plaintiff and its predecessor, as above set forth, not only within the Northern District of California, but in commerce among the several states, and has thereby caused and is threatening to continue to cause great and irreparable injury to plaintiff's said business unless defendants can be restrained by order of this Honorable Court.

XI.

That said use of plaintiff's registered trade-mark on the part of said defendants, and the putting of their grapes on the market as and for plaintiff's goods, constitute not only an infringement of plaintiff's lawful trade-mark, but also unfair and unlawful competition on the part of defendants, which, if continued, will cause irreparable loss and injury to plaintiff.

XII.

That ever since the date of registration of said trade-mark, plaintiff and its predecessor have given due notice of such registration to the public by marking upon the label bearing the trade-mark "Lady Fingers" the words "Reg. U. S. Pat. Off."; and in addition the plaintiff has caused written notice of the infringing acts herein complained of to be served upon defendants, and requested that defendants discontinue the aforesaid infringing

acts, notwithstanding which defendants continued their infringing acts, and threaten to continue the same, to the great injury and damage of plaintiff.

WHEREFORE, as plaintiff can have no adequate relief except in a court of equity, it prays that a writ of subpoena issue, out of and under seal of this Honorable Court, directed to [6] the said defendants and each of them, commanding them to be and appear on a certain day and under penalty in this court then and there to answer this complaint, but not under oath, the oath thereto being expressly waived; that defendants may be compelled to account for and to pay to plaintiff the profits by them acquired and the damages suffered by plaintiff from the said unlawful acts; and that the amount of said damages be trebled in view of the wilful character of the infringement; and that defendants, their servants, agents, and attorneys may be enjoined and restrained by the order of this Court from the use of the words "Lady Fingers," and from selling or offering for sale their grapes as "Lady Fingers," and from doing any other acts or things which are intended or calculated to create confusion as to the origin of plaintiff's goods, and from attempting to divert to defendants any part of the trade which plaintiff has built, in connection with its predecessor, or by means of said trade-mark, and by means of plaintiff's well-earned reputation for superiority of grapes.

And plaintiff prays in this regard not only a preliminary injunction restraining defendants and each

of them, their servants, agents, and attorneys, as heretofore prayed, during the pendency of this suit, but also a perpetual injunction, and for such other and further relief as to this Honorable Court may seem fit.

A. B. HUMPHREY.

By (Signed) A. B. HUMPHREY,
President.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for Plaintiff. [7]

State of California,

City and County of San Francisco,—ss.

A. B. Humphrey, being duly sworn, deposes and says that he is president of A. B. Humphrey Company, a corporation, plaintiff, and is the A. B. Humphrey referred to as plaintiff's predecessor in the within entitled action; that he has read the foregoing bill of complaint for infringement of registered trademark, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

Signed: A. B. HUMPHREY.

Subscribed and sworn to before me this 19th day of September, 1927.

[Seal]

Signed: W. W. HEALEY,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed September 19, 1927. [8]

[Title of Court and Cause.]

INTERROGATORIES PROPOUNDED TO DEFENDANTS BY PLAINTIFF.

Now comes A. B. Humphrey Company, plaintiff in the above-entitled suit, under Equity Rule 58, and propounds to the defendant Ben H. Arkelian, above named, the following interrogatories to be answered under oath, for the discovery of facts material to the support of plaintiff's case:

I.

When and where did defendant Ben H. Arkelian first learn or hear of the words or name "Lady Fingers" applied to fresh grapes?

II.

State the names and addresses of any persons, firms, or corporations who used the name "Lady Fingers" on grapes prior to 1896, and the place where such uses occurred.

III.

State the names and addresses of any persons, firms, or corporations, other than plaintiff, who have actually employed the name "Lady Fingers" on grapes between the years 1895 and 1925. [9]

IV.

State exactly when and where and in what manner defendant Ben H. Arkelian acquired his first knowledge of the use of "Lady Fingers" as applied to grapes.

V.

State precisely the sources of the information and belief which enable defendants to allege in their answer that "for over 40 years immediately last past a variety of grapes known as and called "Ladyfinger" grapes and "Lady's Finger" grapes has been grown, produced, marketed, and sold in the State of California and in the several states of the United States and in foreign countries."

VI.

State precisely when and where defendant Ben H. Arkelian first acquired his knowledge of the application of the name "Lady Finger" to a variety of grapes produced in the State of California, and by whom said name was first applied to such variety of grapes.

VII.

Is there in existence any printed matter showing the use of the name "Ladyfinger" or "Lady's Finger" on grapes by others than plaintiff, prior to 1924; and if so, give further particulars thereof.

VIII.

Give the names and addresses of any persons, firms, or corporations who, in the San Joaquin Valley, employed the name "Ladyfinger" or "Lady Fingers" on grapes in 1883 or thereabouts.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for plaintiff.

October 28, 1927.

[Endorsed]: Filed Oct. 28, 1927. [10]

[Title of Court and Cause.]

ANSWER OF BEN H. ARKELIAN TO INTER-
ROGATORIES PROPOUNDED TO DE-
FENDANT BY PLAINTIFF.

United States of America,
State of California,
County of Fresno,—ss.

Comes now Ben H. Arkelian, one of the defend-
ants above named, and, being first duly sworn on
oath, deposes and makes answers to the interroga-
tories propounded to defendant by plaintiff as fol-
lows, to wit:

I.

Answering Interrogatory I, defendant Ben H. Arkelian, states that he first learned and heard the name “Lady Fingers” applied to fresh grapes in the County of Fresno, State of California, about the year 1895; that about the year 1895 he saw growing on the Eisen Vineyard about six miles east of Fresno “Lady Finger” grapes, which were then commonly known and called “Lady Finger” grapes.

II.

Answering Interrogatory II, defendant, Ben H. Arkelian, does not know the name and address of any person, firm or corporation, who used the name “Lady Fingers” on grapes prior to 1896, except that said defendant does know that the words “Lady Fingers” was used about that time to designate a variety of green grapes grown in the county of Fresno.

III.

Answering Interrogatory III, defendant, Ben H. Arkelian, states that the following persons, firms and corporations have actually employed the name "Lady Fingers" on grapes between the years 1895 to 1925:

Ben H. Arkelian, Modesto, California, [11]
Setchel Fruit Company, Fresno, California,
E. Y. Foley, Fresno, California,
California Growers & Shippers, Fresno, California,
Carl Melcher, McFarland, California,
Armstrong Nurseries, Ontario, California,
California Department of Agriculture, Sacramento,
California,

IV.

Answering Interrogatory IV, defendant, Ben H. Arkelian, states that as a child living in Fresno County, he saw "Lady Finger" grapes growing and ate "Lady Finger" grapes grown on the Eisen Vineyard along the Fancher Creek Canal at the eastern end of Eisen Vineyard, which was located about six miles east of Fresno, California; that these grapes at that time, which was about 1895, were commonly known as "Lady Finger" grapes.

V.

Answering Interrogatory V, defendant, Ben H. Arkelian, states that K. Arakelian, brother of defendant, Ben H. Arkelian, informed said defendant that for over forty years immediately last past a variety of grape known as and called "Lady Finger" and "Lady's Finger" has been grown, pro-

duced, marketed and sold in the several states of the United States and in foreign countries.

VI.

Answering Interrogatory VI, said defendant states that he first acquired his knowledge of the application of the name "Lady Finger" to a variety of grapes produced in the State of California in the county of Fresno at the Eisen Vineyard. Defendant does not know by whom said name was first applied to said variety of grapes.

VII.

Answering Interrogatory VII, defendant, Ben H. Arkelian, [12] states that there is the following printed matter in existence showing the use of the name "Lady Fingers" or "Lady's Finger" on grapes other than by plaintiff prior to 1924, to wit:

1. Webster's New International Dictionary and Encyclopedia of the English language, published in 1920 by G. & C. Merriman Company, Springfield, Mass. defines "Lady Fingers" and "Lady's Finger" as a variety of grape.
2. Armstrong's Nurseries at Ontario, California, published a catalogue in 1922 showing they had a variety of grapevines known as "Lady Fingers" for sale.
3. California Fruit and Vegetable Standardization Act of 1925, General Laws of the State of California, lists "Lady Fingers" as a variety of grapes.
4. California Fruit Traders Agents, Fresno, California, sold "Lady Fingers" grapes on October

3, 1923, which were loaded at Minkler, California, as shown by the inspection certificate of the Department of Agriculture of the State of California.

5. Official Publication No. 25, compiled by the Bureau of Standardization and Viticultural Service, published at the California State Printing Office in 1922, contains the name "Lady Fingers" as applied to grapes.

VIII.

Answering Interrogatory VIII, defendant, Ben H. Arkelian, states that he does not know the names and addresses of any persons, firms or corporations in the San Joaquin Valley, who employed the name "Lady Fingers" or "Lady's Finger" to grapes in the year 1883 or thereabouts.

BEN H. ARKELIAN.

Subscribed and sworn to before me this 30th day of November, 1927.

[Seal] MATTHEW CONLEY,
Notary Public in and for said County and State.

[Endorsed]: Filed November 4th, 1927. [13]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT FOR IN-
FRINGEMENT OF REGISTERED TRADE-
MARK.

Come now the above-named defendants and answering plaintiff's bill of complaint, deny, admit and allege as follows, to wit:

I.

Answering the allegations contained in paragraph II of said bill of complaint, defendant allege that Ben H. Arkelian & Co. is a copartnership consisting of Ben H. Arkelian, A. W. Phelps and A. S. Pilibos.

II.

Answering the allegations contained in paragraph IV thereof, defendants and each of them is without knowledge as to the matters and things alleged in said paragraph IV and for this reason the defendants and each of them deny each and every allegation thereof.

III.

Answering the allegations contained in paragraph V thereof, the defendants and each of them are without knowledge as to the matters and things alleged in said paragraph V and for that reason the defendants and each of them deny each and every allegation thereof.

IV.

Answering the allegations contained in paragraph VI thereof, the defendants and each of them are without knowledge as to the matters and things alleged in said paragraph VI and for that reason the defendants and each of them deny each and every allegation thereof.

V.

Answering the allegations contained in paragraph [14] VII thereof, the defendants and each of them are without knowledge as to the matters and things alleged in said paragraph VII and for that reason

the defendants and each of them deny each and every allegation thereof.

VI.

Answering the allegations contained in paragraph VIII thereof, the defendants and each of them are without knowledge as to the matters and things alleged in said paragraph VIII and for that reason the defendants and each of them deny each and every allegation thereof.

VII.

Answering the allegations contained in paragraph IX thereof, these defendants and each of them admit that they are sellers and dealers in grapes. In this connection defendants allege that they are now and for many years last past have been engaged in growing and producing large quantities of grapes in the State of California; that the grapes so grown and produced by them are of many varieties, including Muscats, Thompsons, Ladyfinger, Alicantes, Mission, Cornichon, Zinfandels, etc. That in addition to growing and producing said grapes these defendants have been and now are engaged in the business of buying, selling and shipping grapes and other fruits throughout the State of California and from the State of California to other states of the Union and there disposing of the same.

That they are the owners of a certain trade-mark known as "Enchantress" label or brand, under which their products are labelled, shipped and sold, a copy of which label is hereunto annexed, marked Exhibit "A," and made a part hereof; that the "Enchantress" brand of defendants' is a well

known and popular brand and products bearing this brand are in demand and meet with ready sale, and defendants are informed and believe and therefore allege that this fact was and is well known to plaintiff herein. [15]

These defendants admit that subsequent to the 22d day of July, 1924, they sold under "Enchantress" brand or label a variety of grapes known as "Lady Finger" grapes and that the "Enchantress" labels were stamped by a rubber stamp with the words "Lady Finger" on said labels; that the words "Lady Finger" are stamped on Exhibit "A" of this answer and were stamped with the same kind of a rubber stamp used by defendants in stamping the labels of all grapes of the "Lady Finger" variety shipped or sold by them since the 22d day of July, 1924. These defendants admit that they sold "Lady Finger" grapes in the State of California and in other states of the United States, and in this connection defendants alleged that each carton, crate or box of grapes was shipped under the "Enchantress" brand label and that the words "Lady Finger" were stamped on each label and that each carton, crate or box contained a variety of grapes known in California as "Lady Finger" grapes; that the stamping of the words "Lady Finger" on each label was made pursuant to and in accordance with the California Fruit, Nut and Vegetable Standardization Act of 1927, Statutes of 1927, Chapter 865.

Further answering paragraph IX of said bill of complaint, these defendants deny that the labels used upon said cartons, crates or boxes were calcu-

lated to deceive or were intended by the defendants to deceive and deny that the public was deceived in many instances or in any instance into the belief that in buying these grapes they were buying the grapes of this plaintiff or its predecessor. Defendants deny that great confusion or any confusion was created in the market or elsewhere as to the origin of these grapes. Defendants deny that by any act or acts of these defendants, [16] or either of them, this plaintiff or its predecessor was damaged in any sum whatsoever; defendants deny that any of the acts of defendants or either of them were an infringement of the rights or trade-marks of the plaintiff. These defendants deny that any sale of "Lady Finger" grapes made by them was made with the purpose or intention of injuring the plaintiff or its predecessor in interest in its or his business and/or divert to themselves any benefit or advantage which might have accrued to plaintiff or its predecessor in interest from the excellence and popularity or excellence or popularity of its grapes. In this connection defendants allege that the shipment and sale of "Lady Finger" grapes was made in the regular course of their business, after conforming with the requirements of law, and without any intention to injure or damage plaintiff in its business.

VIII.

Answering the allegations contained in paragraph X, defendants deny that they sold and offered, or sold or offered, said grapes for sale and so labelled them, or so labelled them, in infringement of the

registered trade-mark of plaintiff and its predecessor, or plaintiff or its predecessor. Defendants admit that they sold grapes under the "Enchantress" brand or label, stamped with a rubber stamp with the words "Lady Finger" in the Northern District of California and in commerce with other states. Defendants deny that by reason of any infringement of the trade-mark or other rights of plaintiff that any injury has resulted or will result to plaintiff's business.

IX.

Answering the allegations contained in paragraph XI, defendants deny that they used plaintiff's registered [17] trade-mark or put their grapes on the market as and for, or as or for, plaintiff's goods and deny that the use of the "Enchantress" brand with the words "Lady Finger" rubber stamped on said brand constitutes an infringement of plaintiff's lawful trade-mark or otherwise, and deny that the sale of said grapes by defendants as aforesaid is unfair and unlawful, or unfair or unlawful competition on the part of defendants and deny that the sale of grapes by defendants as set forth will cause irreparable loss and injury, or any loss or any injury to plaintiff.

X.

Defendants have no knowledge, information or belief sufficient to enable them to answer the allegations contained in paragraph XII and basing their denial on that ground deny that ever since the date of registration of said trade-mark the plaintiff and its predecessors, or plaintiff or its predecessors,

have given due notice of such registration to the public by marking upon the label bearing the trade-mark "Lady-Fingers" the words "Reg. U. S. Pat. Off."

Defendants admit that they received written notices from the plaintiff, complaining that defendants were infringing upon their trade-mark and requesting a discontinuance of the same, and defendants admit that they paid no attention to these notices for the reason that they had not been nor were they contemplating any infringement upon any trade-mark or any of the rights of this plaintiff, and they will continue to ship their grapes under their own label "Enchantress" brand, and defendants deny that any acts of theirs have in any manner damaged or injured plaintiff. [18]

As a first separate defense to plaintiff's bill of complaint, said defendants allege as follows, to wit:

I.

Defendants are informed and believe, and upon such information and belief allege that for over forty (40) years immediately last past a variety of grapes known as and called Ladyfinger grapes and Lady's Finger grapes has been grown, produced, marketed and sold in the State of California and in the several states of the United States and in foreign countries, and that the word "Ladyfinger" is the name given to a common known variety of green grapes grown and produced in the State of California and that the term "Ladyfinger" is descriptive of the said common and known variety

of grapes known by the name of Ladyfinger and Lady's Finger grapes. That said description is recognized as a proper and correct name of said variety of grapes, by the growers of said grapes in the State of California and by the California Department of Agriculture and the Bureau of Fruit and Vegetable Standardization of the State of California. That any trade-mark owned by the plaintiff consisting only of the words "Lady Fingers," issued by the United States Patent Office or the Commissioner of Patents, was issued contrary to the provisions of Section 5 of an Act of Congress entitled, "an act to authorize the registration of trade-marks used in commerce with foreign nations or among the several states or with Indian tribes and to protect the same" (Act of February 20, 1905, Chapter 592, 33 Stat. L. 724 and 725, and amendments supplementary thereof and amendatory thereto), and is therefore void and of no force or effect. [19]

As a second separate defense to plaintiff's bill of complaint, said defendants allege as follows, to wit:

I.

Defendant Ben H. Arkelian alleges that for thirty (30) years immediately last past, to said defendant's knowledge, a variety of grapes known as and called Ladyfinger grapes have been grown and produced in the State of California, and that word "Ladyfinger" is the name given to a common variety of green grapes grown and produced in the State of California. That the said variety

of grapes known as Ladyfinger grapes are whitish in color and are long and thin; that by over thirty years' use of said name "Ladyfinger" in describing said variety of grapes, said word has acquired a generic meaning and has become merely a generic name descriptive of a particular quality, class and variety of grapes, and that said name "Ladyfinger" is *publici juris* for that purpose and in that sense, and is not a proper name for an exclusive trade-mark.

As a third separate defense to plaintiff's bill of complaint, said defendants allege as follows, to wit:

I.

Defendants are informed and believe and upon such information and belief allege that for over forty (40) years last past a variety of grapes known as and called Ladyfinger grapes and Lady's Finger grapes, has been grown, produced, marketed and sold in the State of California and in the several states of the United States and in foreign countries and that the word "Ladyfinger" is the name given to a common variety of green grapes grown and produced in [20] the State of California, which said grapes are whitish in color and are long and thin. That the term "Ladyfinger" is descriptive of said common and known variety of grapes known by the name "Ladyfinger" and "Lady's Finger" grapes, and that the said terms "Ladyfinger" and "Lady's Finger" grapes have been used for many years last past by wholesalers, retailers and consumers of said grapes in the State of California, the

several states of the United States and in foreign countries. That said description is recognized as a proper and correct name of said variety of grapes by the growers of said grapes, by the wholesalers and retailers of said grapes, and by the general public who use said grapes, and by the California Department of Agriculture and the Bureau of Fruit and Vegetable Standardization of the State of California; that the said plaintiff has not exclusively used the word Ladyfinger to describe green grapes grown and produced in California during the past thirty years. Defendants are so informed and believe, and therefore allege, that said plaintiff and plaintiff's predecessors in interest have sold Ladyfinger grapes under the trade name of "Humphrey's Lady Fingers" and that the wholesalers and retailers of the grapes and the public at large who purchased Ladyfingers grapes are not deceived by the fact that the defendants sell grapes under the "Enchantress" brand marked Ladyfinger grapes. That the said defendants have never sold Ladyfinger grapes under the "Enchantress" brand with intent to deceive, or have they deceived the wholesalers and retailers of said grapes or the public at large into believing that the said Ladyfinger grapes of the defendants sold under the "Enchantress" brand were or are the Ladyfinger grapes produced by the plaintiff or plaintiff's predecessors in interest. [21]

WHEREFORE, defendants pray that plaintiff take nothing by reason of its bill of complaint and that the same be dismissed; that defendants recover

their costs of suit incurred herein and that this Court adjudge and declare plaintiff's trade-mark void in whole and that the said certificate of registration be delivered up to the Commissioner of Patents at Washington, D. C. for cancellation, and for such other and further relief as to this Court may seem meet and agreeable to equity.

BEN H. ARKELIAN,
BEN H. ARKELIAN & Co.,
By BEN H. ARKELIAN,
Defendants.

Attorney for Defendants. [22]

State of California,
County of Fresno,—ss.

Ben H. Arkelian, being first duly sworn on oath, deposes and says: That he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

BEN H. ARKELIAN.

Subscribed and sworn to before me this 8th day of October, 1927.

[Seal] PHILIP CONLEY,
Notary Public in and for said County and State.
[23]

Receipt of copy of within admitted Oct. 10, 1927.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

For Defendant.

[Endorsed]: Filed Oct. 10, 1927. [24]

[Title of Court and Cause.]

AMENDMENT TO ANSWER TO BILL OF
COMPLAINT FOR INFRINGEMENT OF
REGISTERED TRADE-MARK.

Come now the defendants above named, and, leave of Court having been first had and obtained, file this their amendment to their answer on file herein, and amend said answer by adding the following defense thereto:

As and for a fourth separate defense to plaintiff's bill of complaint, said defendants allege as follows, to wit:

I.

That said defendants are informed, through the allegations contained in plaintiff's bill of complaint, and believe and therefore allege, that the predecessor in interest of the said plaintiff began growing, shipping and selling grapes under the name and designation of "Lady Fingers" in or about the year 1895, and that the predecessor in interest of the said plaintiff did not apply for, or secure the issuance to him of, a trade-mark on said words "Lady Fingers" until in or about the year

1924. That between the time when the said predecessor in interest or plaintiff began to grow and ship the said grapes under said designation and the time when the said trade-mark was applied for and issued, these answering defendants and sundry other shippers and growers of grapes in the State of California adopted and used, in connection with the production and sale in intrastate and interstate commerce, the words "Lady Finger" and "Lady's Finger" and "Lady Fingers," as the name and designation of a certain variety of grapes grown, produced, shipped and sold by said defendants and by said sundry other persons. That said defendants are informed [25] and believe, and therefore allege, that the predecessor in interest of plaintiff, and plaintiff herein, during all of said times, well knew that said defendants and said other persons were growing, producing, shipping and selling said certain variety of grapes under the name and designation aforesaid, and that said defendant and said other persons did, during said time, build up a market for the sale of grapes so designated and did effect advertising of grapes so designated and expended moneys in so building up a sale for their own grapes named and designated as aforesaid and in advertising their said grapes through labels on the boxes containing the same, and through other means.

That said defendants and said sundry other persons in so advertising acted in good faith and under the belief that they and each of them were rightfully and legitimately using said name and desig-

nation for their said grapes so grown, produced, shipped and sold as aforesaid. That said acts of said defendants and said other persons were done openly and notoriously, and the said facts were at all times and are now known generally to the grape trade.

Defendants are informed and believe, and placing their allegations on said ground allege that notwithstanding said facts, neither plaintiff nor plaintiff's predecessor in interest at any time or at all prior to the issuance of said trade-mark made any protest to said defendants or either of them or said sundry other persons concerning the use by defendants and by said other persons of said name and designation for said variety of grapes grown, produced, shipped and sold by defendants and said other persons. That the application of said plaintiff's [26] assignor for said trade-mark was made without the actual knowledge, and was made without the consent, of defendants or either of them.

That by reason of the foregoing facts, said plaintiff is estopped from now seeking to interfere with the said use by said defendants of said names in connection with the growing, shipping and selling of their grapes, and the said plaintiff is barred from any recovery herein by the laches of itself and of its predecessor in interest.

WHEREFORE, said defendants pray judgment in accordance with the prayer set out in the answer.

BEN H. ARKELIAN,

BEN H. ARKELIAN & CO.,

By BEN H. ARKELIAN,

Defendants.

CONLEY, CONLEY & CONLEY,

Attorneys for Defendants. [27]

State of California,

City and County of San Francisco,—ss.

Ben H. Arkelian, being first duly sworn, on oath deposes and says:

That he is one of the defendants above named; that he has read the foregoing amendment to answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

BEN H. ARKELIAN.

Subscribed and sworn to before me this 23d day of May, 1928.

[Seal]

MARY F. REDDING,

Notary Public in and for Said City and County and State.

My commission expires July 14, 1929.

Copy received May 23, 1928.

WM. A. LOFTUS,

Attorney for Plaintiff.

[Endorsed]: Filed May 23, 1928. [28]

[Title of Court and Cause.]

MEMORANDUM OPINION.

ST. SURE, D. J.—It is ordered that defendants have judgment as prayed.

July 16, 1928.

[Endorsed]: Filed Jul. 16, 1928. [29]

In the District Court of the United States for the
Northern District of California, Southern Division.

IN EQUITY—No. 1951-S.

A. B. HUMPHREY COMPANY,

Plaintiff,

vs.

BEN H. ARKELIAN and BEN H. ARKELIAN
& CO.,

Defendants.

DECREE.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED as follows:

(1) That plaintiff is not entitled to any relief whatever, and shall take nothing by reason of this suit.

(2) That the trade-mark, to wit, "Lady Fingers" now claimed by plaintiff and registered in

the United States Patent Office by A. B. Humphrey, and the certificate of registration of said trade-mark, which is numbered 186,739, and which was issued by the Patent Office of the United States at Washington, D. C. on the 22d day of July, 1924, to the said A. B. Humphrey, are and each of them is void and of no force or effect.

(3) That defendants do have and recover from the plaintiff their costs and disbursements incurred in this suit, and taxed at \$——.

Dated this 8th day of August, 1928.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed and entered August 10th, 1928. [30]

[Title of Court and Cause.]

CONDENSED STATEMENT OF PROCEED-
INGS BEFORE UNITED STATES DIS-
TRICT COURT, AND NARRATIVE OF
TESTIMONY PURSUANT TO EQUITY
RULE 75.

San Francisco, California, Wednesday,
May 23, 1928.

Before Honorable A. F. ST. SURE, U. S. District
Judge.

For Plaintiff: Messrs. CHAS. E. TOWNSEND
and WM. A. LOFTUS, By WM. A. LOFTUS,
Esq.

For Defendants: Messrs. CONLEY, CONLEY & CONLEY, By WM. CONLEY and MATHEW CONLEY, Esqs.

The case being called and counsel answering "Ready," Mr. Loftus, on behalf of plaintiff, made a brief opening statement to the effect that this is a trade-mark infringement suit; that the plaintiff's mark has been registered in the United States Patent Office, the application therefor being filed in April, 1924, and granted July 26, 1924, after due examination on the part of the Patent Office officials, and after the trade-mark had been published for 30 days in the "Patent Office Gazette." The certificate of registration is numbered 186,739 and covers the claimed name [31] "Lady Fingers" as applied to fresh grapes.

Thereupon Mr. W. M. Conley, on behalf of defendants, made a brief statement to the effect that he did not care to make any statement at this time, but that out of an abundance of caution, defendants desired to file an amendment to the answer, setting up laches as an estoppel. A copy having been served on plaintiff, and no objection being made thereto, the amendment to the answer was allowed to be filed.

(The certified copy of the registration of trade-mark in question was thereupon marked Plaintiff's Exhibit 1.)

Thereupon Mr. A. B. HUMPHREY, a witness for plaintiff, was called to the stand.

TESTIMONY OF A. B. HUMPHREY, FOR
PLAINTIFF.

A. B. HUMPHREY, called on behalf of the plaintiff, after being first duly sworn, testified as follows:

I am a general agriculturist, 65 years of age, and reside in Sacramento County. I am president of the A. B. Humphrey Company, a corporation organized under the laws of the State of California in 1918 or 1917. The corporation does a general agriculture business, including the growing of grapes; all varieties, practically, or many of the old varieties of table grapes. The grapes are shipped in the green state entirely, to all the large markets—practically all of the large auction markets of the east; also to some of the cash markets, f. o. b. markets, on the coast, and in the east also.

Prior to organizing the A. B. Humphrey Company, I carried on a similar business under the name of "A. B. Humphrey." The grapes grown and shipped by the plaintiff are raised in Sacramento [32] and San Joaquin Counties. The plaintiff employs or uses the trade-mark or trade name "Lady Fingers" in the shipping of one kind of grape. I obtained the "Lady Finger" grape without knowing what grape it was, in the winter of 1893 and the spring of 1894.

The COURT.—When did you first use the name "Lady Fingers"?

(Testimony of A. B. Humphrey.)

A. I first used the name "Lady Fingers" in '95, when I saw the first bunch of grapes.

Mr. LOFTUS.—Q. How did you come to adopt that name?

A. It took me two years from the original vine that I got, which was a very small planting, evidently raised by the layering plan, which means, digging the buds out of the wood and planting them in a hotbed. That is done where there is a scarcity of the product which you wish to produce; and evidently these grapes had been layered each one from a separate bud, because there was only a small supply available. I got them in moss and I had to use care to prevent losing them in the moss because they were so small. I immediately recognized the fact that they were too small to propagate out in a vineyard under regular methods—

The COURT.—(Interrupting.) What has this got to do with the use of the word "Lady Fingers"?

Mr. LOFTUS.—(To the Reporter.) Read the question, please.

(Question read by reporter.)

A. Well, as I say, the first two years it took me to find out what this grape was; it took a year to get the wood to graft into another vine; it took another year for it to grow and it took another year for it to produce grapes.

The COURT.—Is that what you call "Lady Finger" grapes?

A. Yes. I was around in the vineyard and saw not only the grape itself but the shape of the bunch

(Testimony of A. B. Humphrey.)

and the shape of the grape and that immediately suggested to my mind "Lady Fingers" and [33] I said to myself and also announced it to other people, "I am going to follow this grape up and propagate it and if it has the merit and other qualities for shipping, I am going to propagate it and call it 'Lady Fingers.'" I made that decision in 1895. Prior to that time I had never heard of the name "Lady Fingers" applied to grapes of any kind. I first shipped these grapes in 1898 and 1899. I sent a sample, and wrote on it "Lady Fingers," to my agent in the east, asking for an opinion; and from that time on I used a stamp and stamped them "Lady Fingers." I got them in increased quantities from then on every year. I have continued to ship these grapes since that time and I always employed the name "Lady Fingers" in connection therewith.

Q. I show you a label and will ask you if it is the label used by you.

A. That is the label I use on the cover of my crates. It is applied to all packages.

Mr. LOFTUS.—I offer this label in evidence.

(The label was received in evidence and marked Plaintiff's Exhibit No. 2.)

I advertise the "Lady Finger" brand of grapes by sending out what we call broadsides to the trade immediately before the season opens, through the east to the dealers, to the auction buyers, to the large chain stores, to the wholesale dealers and jobbers in the auction markets in the east.

(Testimony of A. B. Humphrey.)

Q. Can you produce some of these so-called broadsides here?

The COURT.—Oh, I suppose it will be admitted he advertised this grape throughout the east as “Lady Finger” grapes?

Mr. CONLEY.—That is admitted,—as Humphrey’s Lady Fingers.

The COURT.—That is what the sign says,—I can read it from here. [34]

Mr. LOFTUS.—The advertising, however, doesn’t say anything about Humphrey’s name.

The COURT.—Well, it says Lady Fingers on there.

Mr. LOFTUS.—Q. Please identify those so-called broadsides, if you can.

A. I do. They come out every year different, with a letter. The two I have just referred to, two so-called broadsides, are sent out one one year and one another.

Mr. LOFTUS.—I offer these two circulars in evidence.

(The two circulars were thereupon received in evidence, marked Plaintiff’s Exhibit No. 3.)

I don’t know by what name the grape was known when I first started the production of these grapes. If it had a name I had never seen it myself. I identified it as about one of 60 varieties of grapes that I had gathered up in an experimental way, seeking to find some new variety of grape with merit. I am not quite sure whether I obtained the vines or cuttings from which I produced the particular grape

(Testimony of A. B. Humphrey.)

from the Department of Agriculture in Washington or whether it came from the University of California. It came, I think, from one of those two sources.

It is contended that this grape is a Persian variety. That I have learned since this controversy arose. The grapes are shipped in carloads to Chicago, New York and other auction markets and sold at auction; or, in some cases, they are shipped to jobbers who represent me and sell them out to the dealers in small quantities.

Q. Then how does the dealer dispose of them?

The COURT.—What difference does that make?

Mr. LOFTUS.—That, I think, is a very material point, your Honor, showing, as we will show later, the chance for deception of the trade, to the manner in which these grapes are sold, your Honor.
[35]

The COURT.—The whole question here is whether or not he had a right to use the name “Lady Fingers.”

Mr. LOFTUS.—That is, whether the defendant has a right.

The COURT.—Yes.

Mr. LOFTUS.—And that would determine whether or not the defendants’ use of this name would tend to deceive the public.

The COURT.—Do I understand that this is a suit for unfair competition?

Mr. LOFTUS.—That is always connected with a trade-mark infringement and there is an allega-

(Testimony of A. B. Humphrey.)

tion in the complaint as to unfair competition and deception of the public; but in every trade-mark case, unfair competition enters into any case of a trade-mark infringement. That is only one phase of a trade-mark controversy, as your Honor well knows.

The COURT.—It seems to me this case is going to hinge on the one point made by Judge Conley, and that is whether or not this name was a well-known and well-recognized name of a certain variety of grape.

Mr. LOFTUS.—That is, whether it was well known at the time the plaintiff adopted it; not at the time of registering it, because he can take his own time registering it.

The WITNESS.—I first learned of others than myself employing the name “Lady Fingers” on or in connection with grapes, when I began to advertise this variety within the last six or seven years—since 1918 and 1920. Prior to that time I never heard of anyone other than myself using this name “Lady Fingers” on or in connection with grapes. I first heard of the use of the name “Lady Fingers” by the defendants Ben H. Arkelian and Ben H. Arkelian & Company within the last three years. Upon hearing that, I notified Ben H. Arkelian by letter that I had a United States Government trade-mark [36] and asked him to cease using the name “Lady Fingers” in connection with grapes. At that time he was shipping carloads; in one case that I recall, to Chicago and to Pittsburgh, and to the northwest—Portland.

(Testimony of A. B. Humphrey.)

After these larger shipments of "Lady Finger" grapes by the defendant I noted a change in my business. In one case I had made a sale of five cars, I recall, to a cash buyer, and he had expected to handle them exclusively in the market, and he notified me before the first car came in that defendant was quoting a car through his agent in the market which would arrive the same day or possibly the day before, priced on arrival, which is a common practice in the trade. My representative in that market notified me that as far as they could find out the price would be about 25 cents less per package than they had paid me, and they asked me what to do in the premises and protested; and the outcome of that was that I was compelled finally to make them a concession of 25 cents a package on the five cars.

The illustration on the label, Exhibit 2, is a correct representation in general of the appearance of a large percentage of the grapes as they are packed day by day, and which I sell under the name "Lady Fingers." Some bunches are smaller and some bunches are larger.

Aside from my own company and the defendant here, there are a number of other concerns producing a similar appearing grape—in fact, all of the large companies have to ship similar grapes, and, as far as I know, the same grape, and I have notified them, where I find it out in every case, to cease using the name, and in every case they have

(Testimony of A. B. Humphrey.)

ceased using the name. They call them, in some cases I know of, "Rish Baba."

I never sold any cuttings from this grape of mine. [37]

The COURT.—Q. There are a lot of that type of grape grown in the State, aren't there?

A. They are, in small quantities. I control, as near as I can determine, about 90 per cent of the product. I have never refused to give cuttings of the grape,—make a present of the grape to anyone that is interested,—in small quantities.

Mr. CONLEY.—Just a minute, please; I would like to understand that last answer,—he has never refused to give the grape to anyone interested, in small quantities; is that what you said?

A. When this grape began to be known, people wrote to me and asked me to sell them cuttings. I wrote to them in every case that the "Lady Finger" grape is not for sale, but anyone interested in experimenting in varieties of grapes I would be very pleased to give them 100 per cent more than I started with 25 or 30 years previous. I received inquiries back how much that would be and answered "two cuttings"; that I started with one. That generally meant that I never heard from them again. Some came back and said they would be pleased to have them. Every year I have sent out from a half to a dozen samples to people who have asked for them; but I never have sold them.

Mr. LOFTUS.—Q. What is this label, if you know?

(Testimony of A. B. Humphrey.)

A. Well, this is a label that is put on the crates using the name "Lady Fingers" under this "Enchantress" Brand. My agents have always notified me where that appeared in the markets.

Mr. LOFTUS.—I offer this in evidence, and it is stipulated that this is the label used by the defendants.

(The label was thereupon received in evidence, marked Plaintiff's Exhibit Number 4.)

Mr. LOFTUS.—And I call the Court's attention to the stamp down in the corner, the name "Lady Fingers." I think that is all from Mr. Humphrey for the present. [38]

Cross-examination.

I have been in the grape business since '89, commercially, in a large scale. I now have very close to 300 acres growing "Lady Finger" grapes. I did not say that that is 90 per cent of the "Lady Finger" grapes that are grown in California. I said I thought I controlled 90 per cent of the shipments. The cuttings that I got in '93 or '94 came from the Department of Agriculture at Berkeley, or the Department of Agriculture at Washington. At that time there was no department of the University at Davis.

Mr. CONLEY.—Now, let me refresh your recollection. Didn't you get that from Pomona?

A. No. I am certain that I never got them from Pomona. The cuttings from amongst which I got this grape, as I say, either came from the De-

(Testimony of A. B. Humphrey.)

partment of Agriculture at Washington or from the Department of Agriculture at the University of California at Berkeley.

Q. Have you ever had any dealings with the Pomona Nursery?

A. You mean the Armstrong Nursery?

Q. Yes.

A. I bought all of his trees and other varieties of grapes, and I also gathered up a number of varieties of grapes from different sources, from nurserymen in the State. I worked in the nursery business myself for a number of years.

When I received these cuttings I discarded the names in this particular lot, as I remember it, because they were so unpronounceable that I couldn't remember them, and I put numbers on them,—1 to 10 on the first shipment, and the second year, from 1 to 20; and I copied the names in a book and I kept it for years; but my house burned up and the book was destroyed. I never used the names. I don't remember the particular name that was on the cutting of this particular grape. I am certain that the name "Lady Finger" [39] never appeared on those cuttings. I never had heard of the name "Lady Finger" before that.

Q. And you didn't know that before that time vineyardists in this state were raising this same variety of grape and selling them?

A. I had never heard of a grape named "Lady Fingers."

Q. Were you ever out at Escalon?

(Testimony of A. B. Humphrey.)

A. I owned a ranch at Lindsay all the time, and was in and out of that district a good deal.

I have been on the Eisemann vineyard, but I never saw any "Lady Fingers." I went over that vineyard on one occasion with Mr. Rennie, a well-known vineyardist in Fresno, but I never saw a "Lady Finger" grape or heard of a "Lady Finger" grape being grown there.

I never made any inquiry to find out whether or not that variety of grape was being grown. It didn't occur to me that there was. I was not raising grapes at Escalon. The grapes were propagated at Sacramento, Mayhews, at Mayhews.

I named the product of the vine, the bunch of grapes, "Lady Fingers," from the time I saw the first bunch, and told others about it, too. I never saw a bunch of grapes like that before. It was a new variety of grape to me. I denominated this grape "Lady Finger" in '96. I grafted the vine in the winter of '94. I nursed the wood and got a bunch of grapes the second year, in '96. I saw the first bunch in '96 and made the first shipments in 1899.

Before that I had been in the San Joaquin Valley, but I never saw any grapes that looked like or resembled the appearance of the grapes which I named "Lady Finger." I never saw a grape known as "Rish Baba." I never saw the grape known as "Pizzultello di Roma" growing on the vines, but I saw them in the cars; and they [40] were not marked either "Rish Baba" or "Lady

(Testimony of A. B. Humphrey.)

Fingers,"—never. They were marked "White Cornichons." I saw them marked "White Cornichons" years afterward. I never saw the "Olivette Blanche" grape before I started raising these grapes. A number of years afterward I saw them in the market.

Mr. LOFTUS.—I object to this line of examination. It does not touch on the issues at all. It has nothing to do with the issues of the case.

The COURT.—It may be it is a grape similar in appearance. I don't know. I suppose it is or the question would not have been asked.

Mr. LOFTUS.—It is the name we are interested in; not the appearance of the grape. Mr. Humphrey claims that he originated the name.

The COURT.—The question has been answered. Overruled.

The WITNESS.—I had seen white varieties of grapes in California before I grafted the so-called "Lady Fingers," on my own ranch. I had "Sweetwaters," which is a small, round, white grape. I shipped them. Malagas I had seen. I raised Muscats also. They are all white varieties; but nothing resembling my grapes.

Q. Before you applied the name "Lady Finger" to this grape—and I want you to answer this question—did you ever see any grapes growing in California known as the "Rish Baba," "Pizzultello di Roma," "Khandahar" or "Olivette Blanche"?

A. Never.

(Testimony of A. B. Humphrey.)

Mr. LOFTUS.—That is objected to as immaterial—

The COURT.—It is answered, Counsel.

Mr. LOFTUS.—Exception.

The WITNESS.—I am a producer, as well as a seller of grapes. Since '93 I have made a study of the different varieties of grapes, their origins. Since this controversy arose I have [41] made quite a study of the parent plant of the so-called "Lady Finger" variety.

Q. Didn't you find that in Persia, Turkey, and Jugo-Slovakia they raise the same variety of grapes known by the name of "Lady Fingers," or "Lady Finger" grapes?

A. If they are called "Lady Fingers" it is in a foreign name and I didn't recognize it, Mr. Conley.

I have bought many grape cuttings, but never bought any in a foreign land. I have heard the names Muscats, Zinfandels, and Missions. They have been propagated ever since I have been in the grape business.

Q. You have said in your answer, in substance, in other words, you charged the defendant in this action with a fraudulent imitation of your brand. I believe that is the substance of your allegation whereby you have been injured and damaged in the markets in the east and in California. Will you point out to the Court and tell the Court where the imitation is between these two labels that would

(Testimony of A. B. Humphrey.)

deceive anyone? (Handing two labels to the witness.)

A. This (referring to one label) is recent. This is exactly as I handled them up to the time I began to advertise and got a trade-mark and when I got the trade-mark and began to advertise like this (referring to another label), people began to mark "Lady Finger" on every variety of grape that was longer than was wide. This (referring to label) is exactly the way I marked them on the end of the box with a rubber stamp. I have done that for 20 years and over.

Q. Did you have the term "Enchantress Brand" on there?

A. I did not. I had "Lady Fingers" on there, on the end of the box, with my own name, just like it is on this one. (Indicating label.) [42]

Q. If you had never heard of the term "Lady Finger" before you applied it to that grape, why is it you put the term, the name, Humphrey Lady Fingers on there, on this label? Why did you use the term "Humphrey" on there?

A. I used it for this reason. My brand is known in the East,—and I know that by going East and talking with the people—my brand is known as the big black brand. That means, that in place of having a paper label pasted on the end of the box I brand and print on the end of the wood in large letters, "A. B. Humphrey, Grower and Packer." Then I stamp the variety on the end of the box. Now, when I got the trade-mark and started to

(Testimony of A. B. Humphrey.)

spend money to advertise this variety I followed out the idea, in addition to having this printed label, of putting on the end of the box my name and the name of the variety, because, naturally, the box top gets separated from the package itself. When they take the cover off they put it to one side and they will see this label, and they have made it a practice lately of hanging that up on the wall, and, as you will see, it is marked "Humphrey's Lady Fingers."

Q. Is there anybody to your knowledge that has ever told you that he was deceived by this brand into believing that he was buying your grapes, your "Lady Fingers"?

A. I can't say as I have ever raised that question with anybody, Mr. Conley.

Q. Well, I will ask you what is the fact in that matter?

A. The fact is, as I say, I haven't had occasion to discuss that matter.

Q. Then the statement in your answer that people were deceived by buying this brand of grapes under the Enchantress Brand is not true; isn't that it?

Mr. LOFTUS.—Just a minute. Point out what part of it [43] you are talking about. Are you talking about the answer or the complaint, Mr. Conley?

Mr. CONLEY.—The complaint, rather.

Mr. LOFTUS.—The allegation is that people would be likely to be deceived.

The COURT.—I don't see how they would be likely to be deceived by that Enchantress label. The

(Testimony of A. B. Humphrey.)

only issue here is as to the use of the word "Lady Fingers."

Mr. LOFTUS.—Yes, your Honor.

The COURT.—The label is entirely different.

Mr. LOFTUS.—And you can see by the label that they have made use of a registered trade-mark.

Mr. CONLEY.—I don't know whether to treat this as an argument or pleading of fact.

Q. Look at Paragraph 8 of the complaint, Mr. Humphrey. (Handing document to witness.)

A. Yes; I can answer that.

Q. Is that true? A. It is true, yes.

Q. Then, as I understand your answer it is this: That, in your opinion, this label so closely resembles the label you use that the dealer would be likely to be deceived.

The COURT.—That is marked what?

Mr. LOFTUS.—"Enchantress Brand" is the mark. The registered mark is "Lady Fingers."

Mr. CONLEY.—I would like to call the Court's attention to the allegation in Paragraph 9. There is a straight allegation of fact there. (Handing document to the Court.)

The WITNESS.—I can explain, your Honor, where that would be a deception. [44]

The COURT.—Well, the only deception, if any, would be the use of the word "Lady Finger." Wouldn't that be so? There is no similarity whatever between the Enchantress label and the label you use, is there? So that the only deception, if any, would be the use of the word "Lady Finger."

(Testimony of A. B. Humphrey.)

The WITNESS.—If the Enchantress label carried the word “Lady Fingers” and the long variety of grapes was in there it would be a distinct loss, which has been the case many times.

Mr. CONLEY.—Q. Now, I will ask you if you know of a single case in all these years where anybody has ever been deceived into thinking he was buying your grapes when the grapes that were bought bore the Enchantress Brand mark Lady Fingers just as this exhibit shows?

A. My representatives in markets have written me saying that there were other “Lady Fingers” in the market—

Mr. CONLEY.—I move to strike that out, your Honor.

The COURT.—It may go out.

Mr. LOFTUS.—It is an answer to your question.

The COURT.—Q. Did they say that there were other brands of “Lady Fingers” in the market?

A. Yes, and that the party was deceived because they couldn’t distinguish them without eating them.

Mr. CONLEY.—Q. Were they the same variety of grapes?

A. In a great many cases they were not.

Q. How do you know?

A. They were sent to me with the original boxes, —bought and sent to me and they carried the word “Lady Fingers” and they proved to be a different variety of grape from any other grape,—either Rish Baba or from my kind of grapes or any other grapes that I know of. [45]

(Testimony of A. B. Humphrey.)

Q. Did you ever get any letter from anyone in which it was stated he had made a purchase and had been deceived, believing the grapes were Humphrey Lady Fingers?

A. The retail dealer—

Q. Now you may answer that question “yes” or “no.”

A. No. The retail dealer don’t communicate with the grower. They have no method of doing so.

Q. Now, you say you have frequently given cuttings of these so-called Lady Finger vines of different people in California?

A. I have never refused to do so, but I have never given them to anyone without their asking for them.
[46]

On an average of from three to six people each year have written me asking for cuttings of the so-called “Lady Finger” vines, and I have given two cuttings to anyone who asked for them. They were notified that they could not call them “Lady Fingers.”

I know of two instances of parties very close to me who are raising grapes from these cuttings. One of them is my neighbor with whom I was associated in business for twenty years. His name—It is known as the R. A. Stevens Corporation now. They raise and ship probably two or three carloads a year.

Mr. G. Winkelman, who worked for me for more than 20 years, and who resides close to me, annually grows from a thousand to two thousand crates,

(Testimony of A. B. Humphrey.)

—one or two cars; but he sells them with me in my cars.

Mr. Cunningham, who lives close to my original planting, has probably two hundred vines, and sells the product of those two hundred vines.

Q. Over in Stanislaus County are they not raising this same variety of “Lady Finger” grapes?

Mr. LOFTUS.—I object to this line of examination, if the Court please; it doesn’t touch on the name at all. He is asking how many cars of this variety of grape is being raised and sold, but nothing whatever concerning the use of this trade name.

The COURT.—I don’t see the materiality of it.

Mr. CONLEY.—Well, as I understand the law, your Honor, if he sells or disposes of these grapes or cuttings that the purchaser or anybody else to whom he has sold cuttings has a right to use that term “Lady Finger.”

Mr. LOFTUS.—Providing he sold the cuttings under that name.

The WITNESS.—I never sold the cuttings.

Mr. CONLEY.—You gave them away under that name, did you?

A. Yes. [47]

Q. And they are producing them under that name? A. Yes.

Q. And do you know whether they gave any of them away, any cuttings, or sold any of them?

A. I don’t know, and I don’t care.

Q. Have you ever been informed as to whether or not they have?

(Testimony of A. B. Humphrey.)

A. I never have. My opinion is that they do not.

Q. But you don't know, do you? A. No.

Q. Are there any of this variety of grapes grown in the Sacramento Valley,—Sacramento County?

Mr. LOFTUS.—Same objection.

The COURT.—Overruled. If you know.

The WITNESS.—Pardon me.

The COURT.—Q. If you know.

A. These parties that I mentioned are in Sacramento County.

Mr. CONLEY.—Q. Are there any of this variety of grapes grown in the San Joaquin Valley?

A. I don't know.

Q. Are you the only producer of this variety of grape in the Sacramento Valley, "Lady Finger" grapes? A. As far as I know.

Q. Are there any raised in Sutter County?

A. If there are, I don't know of it.

Q. Any in Fresno County?

A. I can't say that I know they are.

Q. Any in Kern County?

A. I have been told that in the last few years, since this came up, that there are people who are raising and shipping "Lady Finger" grapes to some extent up in Kern County.

I have been on the Arkelian place. I did not know he was raising these grapes, except from hearsay. His man showed me the grapes, the vines; they were too young, though, for me to know what [48] they were; but his exact words

(Testimony of A. B. Humphrey.)

were, "This is the so-called Lady Finger." I couldn't tell by looking at them whether there were any grapes on the vine or not. I didn't know whether he had authority to say what he was saying. He was a hired man and there was nobody else on the ranch. That was within the last four or five years.

Q. You know, do you not, that they have been raising this same variety of grapes in California and selling them under the name of "Lady Fingers" for the last ten years, don't you? A. No.

Q. Are you certain about that?

A. Well, the people I gave them to, I know they have been raising them.

Q. I mean anybody else. Haven't you known that many people have been raising and shipping and selling those grapes under the name of "Lady Finger" grapes in this state for over ten years?

A. Not until this matter came up.

Q. I didn't ask you that. Answer the question.

Mr. LOFTUS.—This is objected to, your Honor, as referring to dates long subsequent to the use of this trade-mark.

The WITNESS.—I was induced to get out a trade-mark for that very reason.

Mr. CONLEY.—Q. When were you first informed that they were selling and growing grapes under that name?

A. Through my agents in the east.

Q. When?

A. In 1918 and 1920. For two or three years

(Testimony of A. B. Humphrey.)

I submitted it to them before I got out the trademark.

Q. And you never heard of it before?

A. Never.

The WITNESS.—(Continuing.) I can't say that I know Mr. W. Flanders Setchel. I have seen that man. I never had any conversation with him at any time with reference to the growing and selling of "Lady Finger" grapes. [49]

Q. You never did. Now, let me refresh your memory. Do you remember being in Sacramento in 1918 at a gathering of fruit men, a kind of an emergency call of all the fruit men in the State, where they had a conference or a convention?

A. No.

Q. Were you there?

A. I don't think I was there.

Q. In 1918?

A. I don't think there was any. I don't think I was there.

Q. In reference to the labor question in connection with vineyards? That is a matter I have reference to.

A. There have been numbers of conferences; I wouldn't say whether I was at that particular conference in 1918.

Q. Will you stand up, Mr. Setchel? This is the gentleman to whom I refer. Did you have any conversation with him in 1918 in Sacramento at a hall which is down the street—I think it is K Street—in Sacramento, other people being present, whose

(Testimony of A. B. Humphrey.)

names I can't now recall, in which you had a conversation about the selling and raising of "Lady Finger" grapes? A. Never.

Q. You never did? A. No.

Q. Now, I will ask you if you didn't tell Mr. Setchel everyone was raising and selling them in California, but they couldn't do that, as you had invented the name?

A. I never said that. I never made any such statement as that,—I never made any statement like that to anybody.

Q. Do you take the current fruit periodicals?

A. I read the "Rural Press." Somebody might have sent me a catalogue and I looked at it. I may have seen the work, "California Horticulturist," but I don't recall. I know Mr. George C. Roeding. I have done business with him. I can't say that I examined his catalogues specially to see whether or not "Lady Fingers" were catalogued by him, although I might have done so. I have had [50] a conversation with Mr. Roeding on "Lady Fingers" within the last five or six years.

Q. Well, he informed you, didn't he, that he had been selling this same variety of grapes as "Lady Finger" grapes in Fresno since 1900, didn't he?

A. No, he never did.

Q. What did he say about that?

A. There was so much demand for "Lady Finger" wood from me that I considered distributing it, and Mr. Roeding was the President of the State Board of Agriculture, and I used to meet him at

(Testimony of A. B. Humphrey.)

the fairs. I usually showed at the fairs; and I said to him one day, "Would you consider taking my 'Lady Finger' wood exclusively and selling it?" and he said, "I will think it over. We would have to get out some advertising," and we talked it over in a general way during the fair. It was the State Fair season, and that is a pretty busy one. I do remember having one or two conversations with him. However, nothing definite ever came out of it. That was within the last four or five years—about the time I got the trade-mark.

Only in one make of the dictionary did I find exactly what you allege, that "Lady Finger" was a name given to a variety of grape; but it was a late issue of the dictionary,—1920, I think it was. I had been raising the grape for 25 or 30 years then.

I don't think I ever saw this publication by Mr. George C. Roeding, or one like it, published in 1909. This seems to be a specialty book. I had nothing to do with Mr. Roeding with the exception of his regular commercial catalogue carrying all his standard varieties of trees, oranges and lemons, and I used to buy oranges and lemons every two or three years.

I have never seen any of Armstrong's catalogues. In the last ten or twelve years I have bought two or three orange trees from him. I don't believe I bought them from a catalogue. I applied [51] to Silva Berthold, a nurseryman in my own district, for a certain variety of oranges. They were out

(Testimony of A. B. Humphrey.)

of that variety and said, "You might get them by writing to the Armstrong Nursery at Pomona." That is the only occasion that I recall having anything to do with any Southern California Nursery.

Q. Do you take any of the State publications coming out of the State Printing Office, showing the names and varieties of grapes, and the kinds of grapes that are grown in California? Do you get them? A. No.

Q. Have you ever had an opportunity to examine or inspect any of them? A. No.

Q. I presume, of course, you comply with the law in making your shipments here?

A. Yes; that is all under the County Horticultural Commissioner.

Q. I will ask you if you have ever seen this work at all? (Handing document to witness.)

A. I have only seen this in the last 18 months.

Q. Yes. And you will notice that the name "Lady Finger" appears there under the table varieties of grapes?

A. Yes. And I protested to Mr. Hecke putting that name in there, told him he didn't have any right to do that, and he said, "I didn't know you had a trade-mark. We will take it out." He said that.

Q. You didn't protest to anybody else—

A. Didn't protest until I saw it. I didn't know it was in there at all.

The WITNESS.—We ship our grapes in cars, in lugs, and brace them. Five or six years ago they

(Testimony of A. B. Humphrey.)

were all crates. We have gradually changed until we ship almost all lugs. It is a modification of the Los Angeles lug. They have covers on them. Since I got the trade-mark, I place the label on the top side of the cover. Before that I stamped them on the end of the box "Lady Finger" with [52] a rubber stamp. I do the same thing with other varieties that I produce—Tokay, Cornichon, Emperor, and Malagas. I started doing that long before there was any Fruit and Vegetable Standardization Act; have done it for 38 years.

Q. You don't label the box "Rish Baba," do you? A. Never.

Q. Why not?

A. Well, I don't know the Rish Baba. I don't know that variety—I didn't know it at all until I investigated the matter after this controversy occurred. "Rish Baba" didn't mean anything at all to me.

Q. Well, you didn't put them in as unclassified, did you?

A. I didn't put them in as unclassified. When I started in this business there was no question as to classification.

Q. You didn't ever raise any Pizzutello di Roma grapes, did you?

A. Never, I know the variety, though.

Q. Did you know that the ordinary name of them, the common name, trade name, in this State of that variety of grapes was "Lady Finger" before you ever started raising Rish Baba grapes?

(Testimony of A. B. Humphrey.)

A. It never was.

Q. You are certain about that, are you?

A. I am certain.

Q. And you disagree somewhat with Professor Frederick T. Bioletti of the State University in that respect?

A. No, I don't disagree with Professor Bioletti.

Q. Did you ever discuss with him the question as to whether or not you had taken a common name for the use of applying it to grapes, when you took the name of "Lady Finger"?

A. I have told him that I was raising "Lady Finger" grapes and he has told me that as far as he can determine it is the Rish Baba grape, that they call it "Rish Baba." He said he wanted to come down to my place and find out,—make an investigation, and I told him I would be very glad to have him come down, to come down any time he wanted to. [53]

Q. Didn't he tell you you were applying the wrong name and that "Pizzutello di Roma" was the correct name?

A. He didn't, no, sir. Pizzutello di Roma?

Q. Yes.

A. My district was practically the only district in which it was raised, as far as I know. There were a few raised in the Santa Cruz Mountains; but it was originally brought into Fresno as the White Cornichon until I grew "Lady Fingers" and then they changed it to "Lady Fingers."

(Testimony of A. B. Humphrey.)

Q. Didn't you ever talk to Professor Bioletti of the University? A. Many times.

Q. And you told him you had originated the "Lady Finger" grape? A. Yes, sir.

Q. And he told you that name was put on that grape before you ever told him that, didn't he?

A. He didn't tell me that. He said, "As far as I know, Mr. Humphrey, this variety is known as the 'Rish Baba'; I have made up my mind by study and investigation that it must be the Rish Baba. I would like to have the privilege of coming down to your place and see if it is the same." I said, "Come any time you want to"; but he came at a time, unfortunately, when I was not there, and he told me afterwards, "I am fully satisfied your variety and the Rish Baba are identical."

Q. Didn't he tell you then on the score of priority in California the name "Lady Finger" applied to the Pizzutello di Roma, but on the score of first successful production it applied to the Rish Baba variety? Isn't that what he told you?

A. He may have said that, too.

Q. That is true, isn't it?

A. I don't think it is in any sense of the word. There were no Rish Baba grapes in the market as far as I have been able to find out. I seem to have been the only one that got hold of that variety and produced the first bunch. In [54] all my inquiries I have never found anybody who grew that grape before I did, and growers agree with me.

Q. Now, we don't want a speech on this. You

(Testimony of A. B. Humphrey.)

answer the question. Now, I believe you said that nearly everybody has ceased using the name "Lady Fingers" in the state,—shippers of grapes?

A. Where I have notified them, they have.

Q. Who have you notified?

A. The Earl Fruit Company and the California Fruit Exchange, who shipped about 12,000 cars, I think, a year. They have notified their representatives and have notified their growers to market the grapes under a name other than "Lady Fingers."

Q. How did you know that?

A. Because I have noticed that the growers are putting another name on the boxes.

Q. Very well. What name is the grower putting on where he used to put the name "Lady Finger"?

A. In the cases that I have run across—

Q. Well, who have you run across?

A. I have run across neighbors at mills, Earl Fruit Company growers.

Q. In what counties do they reside?

A. Sacramento County.

Q. You never knew anybody in the San Joaquin Valley who changed the name since you made your protest?

A. I have been investigating the matter and I find that the order went out as a general order.

Q. From whom?

A. From the head offices of the Earl Fruit Company and the California Fruit Exchange and I can't recall right now—

Q. Well, the orders were given to whom?

(Testimony of A. B. Humphrey.)

A. We wrote the Earl Fruit Company protesting against the use of the name "Lady Fingers" and after one or two exchanges of letters they issued the order. [55]

Q. Just a moment, now. They issued the order, you say? A. Yes.

Q. In what form did they issue it?

A. They sent out a circular telling their growers confidentially—this is only judgment on my part because of the results—

Q. Well, you don't know anything about it, whether they issued an order or not, do you?

A. Except that the growers quit using the name "Lady Fingers."

Q. What growers quit?

A. Specifically, I can't say. A man by the name of Humphrey, for one, who happens to be a neighbor of mine, but not a relative of mine, however; a man by the name of Winkelman, who shipped with the Earl Fruit Company.

Q. You know the reason they quit, don't you? Wasn't it on account of representatives you have been sending around threatening them if they used that name "Lady Fingers" that you would prosecute them?

A. I am too mild a man to do that. I never did that.

Q. You didn't do that? A. No.

Q. Only last year didn't you threaten Mr. Fernand de Journal and Robert de Journal, who live

(Testimony of A. B. Humphrey.)

in Fresno, that if they did not discontinue using this name you would bring suit against them?

A. My attorneys wrote them, perhaps.

Q. Then you don't stand responsible for their acts?

A. Well, I have confidence in my attorneys, yes.

Q. Did you ever instruct your attorneys to threaten them with a lawsuit if they didn't discontinue using the name "Lady Fingers"?

A. I merely brought it to their notice. Here is an infringement. What is to be done? They wrote the letters.

Q. Now, I want to know something about that 25 cents per package concession which you say you made last year up in Portland, Mr. Humphrey. Is that where that concession was made?

A. Portland, yes. [56]

Q. Whose grapes were they? A. Mine.

Q. That had been sold?

A. They were on the road to sell.

Q. How do you know that?

A. My agent notified me that the agent of the party who was using that name had told them.

Mr. CONLEY.—Now, if your Honor please, we move to strike out the testimony on the ground that it is manifestly hearsay. He stated it as a positive fact in his direct examination that the fact existed. Now, he says he has been told by somebody else that told them that told someone else who told him.

The COURT.—Motion denied.

(Testimony of A. B. Humphrey.)

Mr. CONLEY.—Q. Now, to whom did you make this 25-cent concession,—your agent?

A. Directly to my agent.

Q. And the reason was what?

A. He came to me and said, “We are beat before we start.” I said “Why?” and then he said, “Well, we agreed to pay you a certain price. This man Arkelian has a car of grapes on the road which will arrive here about the same day as our first car arrives, or perhaps a day prior to the arrival of our first car, which the agent is pricing on arrival, and we are informed it will be 25 cents less than we have agreed to pay you.”

Q. Twenty-five cents less per what?

A. Per package.

Q. That would be how many pounds,—how many dollars per car? A. \$250 a car.

Q. That would be 25 cents less per package, would be a cent a pound, wouldn't it?

I. It would be 25 cents a package. There are a thousand packages in a car. I sell them by the package—26 pounds in a package.

Q. You don't know whether your agent told you the truth or not, do you?

A. I know he told me the truth because he came to me personally and made the deal with me to come back and tell me the facts and I made a concession to him accordingly. [57]

Q. Do you know whether Mr. Arkelian ever sold any grapes for as low a price as you sold your grapes to your agent?

(Testimony of A. B. Humphrey.)

A. I don't know, because I didn't go up there.

Q. You don't know anything about it?

A. I didn't go up there; I don't know.

Mr. CONLEY.—That is all.

Redirect Examination.

Mr. LOFTUS.—Q. At the time that you first gave this grape the name "Lady Fingers" did you have occasion to apply any name to any other variety of grape?

A. Oh, yes.

Q. What other variety?

A. In that lot there were ten varieties. They were all numbered from 1 to 10. They were all grafted in a row by themselves; and numbers 4 and 8 proved to be alike, although they came with different names on them, unpronounceable names that nobody can remember without carrying a memorandum around with them; and the numbers 1 and 2 proved to be a fine quality of grape,—only one was very small, a very small white grape, and another one was a little bit larger, a round, white grape. I named those. They didn't produce that year. They didn't produce until the following year, and I named those "Baby toes." They were a totally different grape from the Lady Finger, and they were a grape—that is—the berry itself was just about the size of a baby's big toe, and I just called this one "Baby Toes" and have ever since been raising them and calling them "Baby Toes."

(Testimony of A. B. Humphrey.)

Q. You are still growing a brand of grapes known as "Baby Toes"? A. Yes.

Mr. LOFTUS.—I think that is all. [58]

Recross-examination.

The larger variety I called "Baby Toes, Number 2," and immediately after that I got a supply of the wood and grafted it into old vines and it proved that it was a very shy bearer. We then discarded Number 2 and I gave the name to Number 1, which was a similar berry; and it proved to be a good bearer. I kept it and called that "Baby Toes."

The COURT.—Q. You had them numbered 1 to 10, and one you called "Baby Toes." What did you call the rest?

A. I never pursued the propagation of the rest, except the "Lady Fingers" and the "Baby Toes." They proved to be indifferent varieties, not worth anything as commercial varieties. They were red varieties and black varieties. I have them yet; but I don't ship any of them commercially.

Mr. CONLEY.—Q. Do you ship any under the name "Baby Toes"?

A. Yes.

Q. For how many years have you done that?

A. Ever since I have been producing them.

Q. They are not listed in the Standardization Act, are they?

A. I don't think so. Nobody raises them.

Q. What is the real name of that variety?

A. I can't say.

(Testimony of A. B. Humphrey.)

Q. Did you find any other names for the other ten as his Honor asked you a moment ago?

A. No.

Q. You ran out of names as soon as you got through with those two varieties,—“Lady Fingers” and “Baby Toes”; is that it?

A. I didn’t propagate the other varieties. I would have if they had had merit. They didn’t have any merit, so I never considered naming them. There was no incentive.

Q. Those are the only two varieties you have ever named,—“Lady Fingers” and “Baby Toes”?

A. That is all. That is all I got [59] out of that lot. I had 60 varieties gathered up from different parts of the United States and Europe and those are the only two I considered of any commercial value.

Q. Why don’t you try to market more “Baby Toes”?

A. They haven’t got the outstanding appearances of the grape, such as the one I discovered that is named “Lady Fingers.” There are other grapes that are almost the same and just as good, and I never had any reason to believe that they had merits sufficient to justify propagating them like I do “Lady Fingers.”

Mr. CONLEY.—That is all.

Redirect Examination.

Mr. LOFTUS.—You mentioned the fact that you used a rubber stamp with which to affix that name “Lady Finger” to the boxes and packages prior

(Testimony of A. B. Humphrey.)

to your adoption of this more elaborate label. Do you recall getting such a rubber stamp from a rubber-stamp manufacturer in Sacramento?

A. Yes. Immediately after I began to get a supply of these grapes I got a rubber stamp made for them the same as I had prepared for all the other varieties. If they were mixed up in the car with Tokays, Cornichons, and other varieties, I had to designate them; so I had a rubber stamp made for each variety.

Q. When was that?

A. I would say in the early part of 1900, although I failed to find a record prior to 1905. But in 1901, '02, '03 and '04, we were shipping them in quantities sufficient to have a stamp. The first ones we got, I remember writing the name,—only having 2, 3, 4, 5 or 20 crates the first year or two and I wrote the name on or printed it on with a pencil. Then we got a stamp. And in 1905 we have a record of getting a stamp, and ever since then I have been keeping a supply of those stamps on hand, Mr. Loftus. [60]

Mr. LOFTUS.—I want to offer in evidence a photostatic copy of one page from the ledger of the rubber-stamp manufacturer, showing an item dated "August 8, 1904," reading: "Lady Fingers #1 Pad for A. B. Humphrey," and so forth, and counsel has agreed to stipulate that that may go in without calling the man who kept the ledger.

(The photostatic copy of the Ledger Sheet re-

(Testimony of George Winkelman.)

ferred to was received in evidence and marked Plaintiff's Exhibit 5.)

Mr. LOFTUS.—That is all.

(Witness excused.)

TESTIMONY OF GEORGE WINKELMAN, FOR PLAINTIFF.

GEORGE WINKELMAN, called as a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

The COURT.—Is this a neighbor?

Mr. LOFTUS.—Yes.

The COURT.—I suppose he will testify he got cuttings of these grapes from Mr. Humphrey?

Mr. LOFTUS.—Yes.

The COURT.—And has grown them?

Mr. LOFTUS.—And that he markets his grapes as “Rish Baba” grapes and he sells them to others through the plaintiff, A. B. Humphrey.

The COURT.—I suppose you will stipulate that he will testify to that?

Mr. CONLEY.—I didn't get that, your Honor.

The COURT.—That he will testify he is a neighbor of Mr. Humphrey, and I suppose he is the man that has been given cuttings of these so-called “Lady Finger” grapes and counsel now adds to what I stated, that he markets his grapes as “Rish Baba” grapes and that he sells those grapes through the plaintiff. [61]

Mr. CONLEY.—If counsel so states, I will stipulate he will so testify.

(Testimony of George Winkelman.)

Mr. LOFTUS.—And Mr. Winkelman was present at the time this grape was first produced and was present there and saw the grape.

The COURT.—And I suppose he will say he was there and that Mr. Humphrey said “This is the ‘Lady Finger’ grape.”

Mr. LOFTUS.—And, further, Mr. Winkelman has been in the viticulture business for many years and has never heard that name being applied to any other grape at any time.

Mr. CONLEY.—We will stipulate to that, that he would so testify. But I would like to ask Mr. Winkelman a few questions.

Cross-examination.

As near as I can recall, I first observed these “Lady Finger” grapes out at Mr. Humphrey’s place, the second year after it was grafted. It was grafted in the spring of ’94 and I saw the bunch of grapes in ’95. There were eight or ten,—ten varieties of vines. On this particular vine there were produced one or two bunches of grapes. Some of the other vines and varieties didn’t have any grapes. All told, I saw more than a half dozen bunches of grapes. The vines just had numbers on them, and when these grapes first came we were all interested, looking for the quality and so forth, and this particular one was different from any others we had even seen; and he stated it had merit. And my recollection is and I have always understood that Mr. Humphrey called it “Lady Fingers” on account of the shape of the berry.

(Testimony of George Winkelman.)

Q. He didn't say anything about "Lady Fingers" at the time when you were looking at the grapes, did he?

A. That is too far back.

Q. You don't remember hearing him say the word "Lady Fingers" [62] at that particular time? A. Not at that particular moment.

Q. You don't remember how you first heard the term "Lady Finger," do you?

A. I remember distinctly that the term "Lady Finger" applied to the shape of the berry. That is my recollection.

Q. That was a long time afterwards, though?

A. No.

Q. How long afterwards?

A. It may have been right there. It may have been that next year.

Q. It may have been the next year, you say?

A. Yes.

Q. You have been talking with Mr. Humphrey since this trial commenced, have you not?

A. No.

Q. You never said a word to him about it?

A. About this trial?

Q. Yes.

A. There has never been a word said about the trial; only that the trial would come up.

Q. And he didn't talk to you about what your evidence would be here at all? A. My God, no.

Q. No. That is all. I have just one or two more questions. Did you ever ship any of these

(Testimony of George Winkelman.)

grapes under the name of "Lady Fingers," the grapes you raise yourself?

A. Yes. I have shipped some. I have shipped them for a number of years.

Redirect Examination.

The shipments I make of "Lady Finger" grapes is now done under license of Mr. Humphrey. Mr. Humphrey gave me a stamp last year to mark the boxes with. I think it says, "Packed under supervision of A. B. Humphrey Company." They are shipped in Mr. Humphrey's cars. When I make shipments through the Earl Fruit Company, I stamp the boxes "Rish Baba." As near as I remember, Mr. Humphrey made his first shipments about 1898 or '99. I worked for Mr. Humphrey for 31 years. [63]

The COURT.—Q. After you testified that you were shipping "Lady Finger" grapes you said, "It is now." What did you mean when you said, "It is now"? You gave me the impression that you had in the beginning shipped grapes as "Lady Finger" grapes.

A. No. We never shipped any as "Lady Finger" grapes except through Mr. Humphrey. Personally I have never shipped any "Lady Finger" grapes at all until, oh, it might have been, I guess, about 5 years ago.

Q. And did you then ship them as "Lady Finger" grapes? A. Yes.

(Testimony of George Winkelman.)

Q. And then after that Mr. Humphrey gave you the stamp? A. He did.

The COURT.—That is all.

(Witness excused.)

TESTIMONY OF JERRY BUCKLEY, FOR PLAINTIFF.

JERRY BUCKLEY, called as a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

My postoffice address is Mills, California. I am 62 years of age. I am in the horticultural business, and have been since 1885. I am acquainted with Mr. A. B. Humphrey; have known him since 1892. I was his foreman for a number of years on the ranch at Mayhews. My knowledge of Mr. Humphrey's production of grapes under the name "Lady Finger" was had by reason of the fact that I grafted a number of cuttings on to some young Tokay vines which were one or two years old at that time. I did that work—I am pretty sure I did some of it in '94 and some in '95. It is my recollection that Mr. Humphrey got two separate lots of cuttings. There was less than a dozen in one lot, and two or three dozen in another; and I grafted them all on the same young Tokay vines, which were planted in '93. The vines were numbered as I got them, and I [64] put the numbers on the stakes as I grafted the vines. All kinds of grapes grew out of that—some good, bad, and indifferent.

I don't know how the one came to be called "Lady

(Testimony of Jerry Buckley.)

Finger” but I can tell when I first heard that name. In 1896 I moved from Mr. Humphrey’s ranch to Butte County. In ’98 Mr. Humphrey and his children were visiting me there. I asked one of his little girls about this new variety of grapes, and they told me they had named two of them, “Lady Fingers” and “Baby Toes.” I remember that because I thought at the time they were poor names to give to grapes. Thereafter I have seen “Lady Finger” grapes being grown and shipped [65] by Mr. Humphrey, but not in very close touch. I am living now within three or four miles of Mr. Humphrey’s ranch and have been for 25 years. Prior to 1898 I never had heard of the name “Lady Finger” applied to grapes at all, and I had been in the horticultural business since 1885.

Mr. LOFTUS.—That is all.

Cross-examination.

I am not familiar with the San Joaquin Valley, and I never was down there to investigate whether or not grapes of that variety were grown there.

Mr. CONLEY.—That is all.

Mr. LOFTUS.—Nothing further.

PROFESSOR BIOLETTI.

Mr. LOFTUS.—I expect a witness here at two o’clock, your Honor. I didn’t want to detain him any longer than necessary and told him to come at 2 o’clock. It is Professor Bioletti, and he is very busy; he is a Professor at the University over in

Berkeley and has classes over there, and I didn't think we would need him until two o'clock.

The COURT.—What do you want to prove by him?

Mr. LOFTUS.—I want to bring out from him that the scientific name for this grape is "Rish Baba" and is so known throughout the industry.

The COURT.—I suppose you will admit that?

Mr. CONLEY.—No. We can't stipulate that to be the fact. We will stipulate that Professor Bioletti would so testify, if called as a witness, that the name formerly applied to it was "Rish Baba." Is that it, Mr. Loftus?

Mr. LOFTUS.—Yes; that Professor Bioletti would testify [66] that the scientific name of this grape which Mr. Humphrey has named "Lady Finger" is "Rish Baba"; and that the grape is so known throughout the industry as the "Rish Baba" grape.

Mr. CONLEY.—Yes.

The COURT.—A Persian grape?

Mr. LOFTUS.—Yes.

Mr. CONLEY.—We will stipulate that he will so testify. "Rish Baba," which means "Papa's Beard."

Mr. LOFTUS.—And I wanted Professor Bioletti to identify the article which he has written for this publication, entitled "California's Most Important Table Grape Varieties," with which counsel is undoubtedly familiar.

Mr. CONLEY.—I don't see the dates.

Mr. LOFTUS.—It is dated May 1, 1925.

The COURT.—What is the purpose of that?

Mr. LOFTUS.—It is a discussion by the scientist of this variety of grape, in which he states that the true name is “Rish Baba” and explains how it happened to be so named, and goes on and states that the “Lady Finger” is the trade name of the Humphrey variety.

The COURT.—Well, that is a mere statement of his opinion upon the matter. What weight has that?

Mr. LOFTUS.—If I had him on the witness-stand I wanted to repeat what was in this article here.

Mr. CONLEY.—Well, that—

The COURT.—He may have investigated the question and that may be his opinion as to how that grape came to be called “Lady Finger.”

Mr. LOFTUS.—Well, this was written after a great deal of investigation. [67]

The COURT.—Well, I suppose you will have to have him here. I don’t suppose you will want to admit that in evidence, Judge Conley?

Mr. CONLEY.—If he is to be here I would like to ask him two or three questions.

Mr. LOFTUS.—He will be here at two o’clock. As I say, he is a very busy man, attending to classes over at the University and—

The COURT.—What do you want to prove by him? That this was originally a Persian grape and that the true name of it is “Rish Baba”?

Mr. LOFTUS.—He discusses the whole history of the grape in this short article.

The COURT.—We don't care particularly for that, do we?

Mr. LOFTUS.—Yes. I think it is material, your Honor.

The COURT.—I don't see how it is.

Mr. LOFTUS.—If the other side is willing to admit this grape was originally imported into this country from Persia and that the original name of it was "Rish Baba"—

The COURT.—And now it is claimed that it has a trade name, "Lady Finger," and you claim your client discovered that name and has a monopoly on it?

Mr. LOFTUS.—That he was the first to adopt and use it.

The COURT.—I don't think the professor can throw any light on that. Your client says he is the first man that applied that name to the grape and selling the grape under that name to the trade.

Mr. LOFTUS.—If those things are stipulated to I don't think it will be necessary to call Professor Bioletti.

The COURT.—You can't stipulate to that. How can you stipulate to that? [68]

Mr. LOFTUS.—I am referring as to the origin of the grape; that "Rish Baba" is the correct scientific name of Mr. Humphrey's "Lady Finger" and that the grape originally came from Persia.

The COURT.—Will you stipulate that this grape originally came from Persia?

Mr. CONLEY.—Yes.

The COURT.—And that the grape was originally known as “Rish Baba”?

Mr. LOFTUS.—And that it is so known in this country?

Mr. CONLEY.—That is just the fact; it is not so known in this country.

Mr. LOFTUS.—Professor Bioletti can testify to that.

Mr. CONLEY.—I will guarantee you that there isn't one in a hundred professors that can testify he ever saw a Rish Baba grape in this state. I am 62 years old and was born right here in this state and I never have seen a Rish Baba grape, or a grape known as “Rish Baba” here, and I have got a lot of witnesses here who have been in the grape business all their lives who never heard the name “Rish Baba.”

The COURT.—I am not going to take up a lot of time on witnesses of that kind.

Mr. LOFTUS.—We would like to have him identify this pamphlet or this article which he wrote here.

Mr. CONLEY.—I am willing to stipulate with you, Mr. Loftus, that the professor will swear to what he said in there. I won't, however, stipulate that as being the fact.

The COURT.—I would not expect you to do that. All right. Do you want to offer that?

Mr. LOFTUS.—All right. I will offer the pamphlet in evidence, particularly with respect to the pamphlet entitled: [69] “California’s Most Important Table Grape Varieties,” published by the California Grape Growers, San Francisco, California, dated, San Francisco, May 1, 1925. I offer it in respect to the article entitled: “Persian Grapes,” by Frederick T. Bioletti, University of California, appearing on pages 15 and 16.

(The pamphlet was received in evidence and marked Plaintiff’s Exhibit 6.)

Plaintiff rests.

Thereupon court adjourned until two o’clock P. M.

AFTERNOON SESSION—MAY 23, 1928, 2 P. M.

Mr. CONLEY.—If your Honor please, perhaps to save time, it is stipulated that Webster’s New International Dictionary of the English Language, published by G. & C. Merriam Co., Springfield, Massachusetts, defines Lady Finger,—See Lady’s Finger,—as a variety of grape. Your witness testified to that this morning.

Mr. LOFTUS.—I didn’t understand that he testified to the date. I have no evidence as to the date of the publication.

The COURT.—I understood Mr. Humphrey, your client, to state that it was in 1920 or 1921,—something like that. Isn’t that right? That edition of Webster’s Dictionary that you saw was 1920 or ’21?

Mr. HUMPHREY.—I looked it up last year in

the Mechanic's Library. I looked up all the dictionaries, and I found one dictionary which was dated as being edited in 1921. I think it might have been 1920; but I could not find it only in one edition. None of the older editions could I find it in. [70]

Mr. LOFTUS.—I will stipulate to the extent of Mr. Humphrey's statement.

The COURT.—Of course, what he testified to you will stipulate. If you have the dictionary, and I think we have it in our library, probably—if we have it won't be necessary to stipulate to that. I can refer to it.

Mr. CONLEY.—I simply wanted to avoid taking the time and trouble of digging one up.

The COURT.—Well, if you will state the edition and the authority I will dig it up.

Mr. CONLEY.—Very well.

The COURT.—Is that what the dictionary says, as you just stated?

Mr. CONLEY.—Yes. It defines "Lady's Finger" as a variety of grape. And we also have the Armstrong Nurseries catalogues for 1921 and 1922. We offer these in evidence for the purpose of showing that grapes were listed at that time as "Lady Finger."

The COURT.—1920 and '21?

Mr. CONLEY.—1921 and 1922, your Honor.

Mr. LOFTUS.—They bear those dates?

Mr. CONLEY.—Yes. (Showing catalogues to Mr. Loftus.)

We offer in evidence page 19,—it is the same page in each of these catalogues of the Armstrong Nurseries, which defines “Lady Finger” grapes under the caption “Select Vine and Bush Fruits” and in the middle of the page scored in red indicating “Lady Finger” grapes: Bunches larger; berries long, white; flesh tender, crisp and sweet.”

Mr. LOFTUS.—I make the objection to all these offers that they are incompetent, irrelevant and immaterial, being many years [71] subsequent to the adoption and use of the trade-mark in question by the plaintiff.

The COURT.—Overruled.

(The two catalogues were received in evidence and marked, respectively, Defendants’ Exhibits “A” and “B.”)

Mr. CONLEY.—I overlooked to state that in the Armstrong Nurseries Catalogue of 1921, on page 19, the same statement appears. Also in “California Horticulture,” by George C. Roeding, copyrighted in 1909. We offer that in evidence for the purpose of showing a variety of grape known as “Lady Finger,” on page 42.

Mr. LOFTUS.—I object to that, your Honor, as there is no evidence here as to the date of the publication of that pamphlet. It is a private pamphlet, and its date of publication is in nowise proved. It merely states “Copyrighted,”—that a copyright was taken out in 1909. That may be a subsequent edition.

The COURT.—Do you want to bring someone here from Roeding's plant to testify to the date of the publication of that pamphlet?

Mr. CONLEY.—We tried to get Mr. Roeding this morning and we were unable to get him.

The COURT.—Well, if you are going to question the date of the publication, I will give the judge an opportunity to bring someone here to prove it.

Mr. CONLEY.—I will offer the pamphlet in evidence for whatever it is worth. It is only introduced to show the name was published and had been circularized all over the state as early as 1909.

Mr. LOFTUS.—The copy doesn't show when it was published. It has a copyrighted date. That may pertain to an earlier edition that did not contain any of this information. [72]

The COURT.—That may be true. You don't know when that was published?

Mr. CONLEY.—It doesn't state on here, your Honor.

The COURT.—Perhaps you can find that out. Who printed it? (The pamphlet was handed to the Court.) It appears here: "California Horticulture, by George C. Roeding." That appears on the outside of the page. It does not show the date, except "Copyrighted, 1909, by George C. Roeding. All rights reserved." I suppose it was published before that.

Mr. LOFTUS.—It is a different edition, no doubt. These things are revised each year.

Mr. CONLEY.—If it becomes important I will see if I can't get Mr. Roeding here.

We also offer in evidence—

The COURT.—You had better mark that. (The book entitled “California Horticulture” was marked Defendants' Exhibit “C.”)

Mr. CONLEY.—We also offer in evidence the California Standardization Act of 1927, with particular reference to page 14, where there is a variety of grapes listed and scheduled as “Lady Finger.”

Mr. LOFTUS.—The date of that is 1927.

Mr. CONLEY.—The date of that is 1927.

Mr. LOFTUS.—The same objection to that.

The COURT.—Overruled.

(The copy of the California Fruit, Nut and Vegetable Standardization Act of 1927 was received in evidence and marked Defendants' Exhibit “D.”)

Mr. CONLEY.—We also offer in evidence this mimeographed copy of the California Fruit, Nut and Vegetable Standardization Act of 1927, provisions of Section 22, arranged by California Department of Agriculture, G. H. Hecke, Director, Bureau of Fruit and Vegetable [73] Standardization, W. F. Allewelt, Chief, on page 1, and on page 2 under classification of varieties we find the name “Lady Finger.”

(The document referred to was received in evidence and marked Defendants' Exhibit “E.”)

TESTIMONY OF W. FLANDERS SETCHEL,
FOR DEFENDANTS.

W. FLANDERS SETCHEL, a witness called on behalf of defendants, after being duly sworn, testified as follows:

I reside in Redwood City, and my place of business is the Russ Building, San Francisco. I was engaged in the grape-growing industry in this state for 14 years. During that time I also sold grapes. I have seen this work on California Horticulture before. I purchased this identical copy the early part of 1911 in Fresno, at the offices of the Roeding Nurseries. It has been in my possession ever since, until Mr. Conley took it from me a few weeks ago.

Mr. CONLEY.—We offer it in evidence as of a date at least as early as 1911.

Q. Did you ever own any vineyard property in Fresno County? A. Yes.

Q. And what ranch was it known as?

A. I owned altogether at one time 1300 acres of vineyard in Fresno County. Do you wish me to state that I owned the Carmelita Vineyard?

Q. I will ask you to state anything you want in that connection.

A. Yes, I at one time owned the Carmelita Vineyard in Fresno County.

Q. And I will ask you if you grew any "Lady Finger" grapes on that vineyard? A. Yes.

Mr. LOFTUS.—This form of questioning is ob-

(Testimony of W. Flanders Setchel.)

jected to. The issue is what use, if any, was made of the trade-mark, the name, [74] "Lady Finger," prior to the adoption and use of it by the plaintiff.

The COURT.—Overruled. I suppose that is what Mr. Conley is leading up to.

Mr. CONLEY.—Q. How many acres were planted to vineyard in the Carmelita property?

A. When I purchased it, 232.

The COURT.—Q. When was that you purchased it? A. 1915.

Mr. CONLEY.—Q. How many acres were in "Lady Fingers"?

The COURT.—232 acres, he says.

The WITNESS.—No, your Honor; 232 acres in the property.

The COURT.—Q. How many acres in "Lady Fingers"?

A. I would imagine about 5 or 6 acres.

Mr. CONLEY.—Q. And were those grapes bearing at the time you purchased the vineyard?

A. Yes.

Q. They were in bearing? A. Yes, in 1915.

Q. From whom did you purchase that vineyard?

A. From Arthur W. and W. S. Goodfellow.

Q. I will ask you if you made any disposition of your crop of grapes in 1915?

A. Yes; I picked them and shipped them.

Q. And what was the name of the variety; under what name did you ship them?

A. "Lady Finger."

(Testimony of W. Flanders Setchel.)

Q. Where were they sold?

A. They were sold principally in New York and Chicago.

Q. I will ask you if you ever knew these grapes by any other name?

A. No. We always called them "Lady Finger."

Q. And do you know when Mr. Goodfellow planted the grapes?

A. He did not plant them. They were grafted two years prior to that. He grafted some Zinfandels in 1913.

Q. Do you know of any other grapes of that variety being grown in the San Joaquin Valley other than on the Carmelita Vineyard?

A. In 1916, '17 and '18 I shipped carloads of them from the Lindsay district. [75]

Q. And the Lindsay district is located in what county? A. Tulare.

Q. Do you know of any other county other than in the San Joaquin Valley or in the State where "Lady Finger" grapes are grown?

A. I have heard they are grown elsewhere in Fresno County. Of my own personal knowledge, outside of Fresno and Tulare County, I only know they are grown on Mr. Humphrey's place.

Q. Mr. Humphrey's place is in Escalon?

A. Yes.

Q. I will ask you if you had occasion to meet Mr. Humphrey at any time during the year 1918 in the City of Sacramento?

A. That is the only occasion I have ever met and

(Testimony of W. Flanders Setchel.)

talked to Mr. Humphrey was in Sacramento in 1918.

Q. And what was the occasion that you visited with him at that time?

A. I was president of the Valley Fruit Growers' Association that was handling the farm labor in California in the main and we held a meeting of farmers and labor contractors in Sacramento, among other places, and while I was there Mr. Humphrey either introduced himself to me or was introduced to me and told me he had this place at Escalon and that he had "Lady Finger" grapes. He stated in the course of our conversation that he had grown them for some while and I told him that I had also grown some and was shipping them and we commented on the qualities of the grape and he made the statement to me that remained in my mind that myself and others that were shipping the grapes ought not to be using the name "Lady Finger," and he conveyed the thought to me he had some rights to it.

Q. You informed him you were shipping these grapes right along? A. Yes.

Q. Did you continue shipping them?

A. Certainly.

Q. For how many years after this conversation?

A. For four years after that. [76]

Q. You received no notification from him or from his attorneys to cease shipping during that time, did you? A. No.

Mr. CONLEY.—Take the witness.

(Testimony of W. Flanders Setchel.)

Cross-examination.

Mr. LOFTUS.—Q. How many crates of these “Lady Finger” grapes, which you call “Lady Finger” grapes, did you ship all together,—that is, while you were in charge of the property?

A. I am going to approximate this, you understand; I would say about 14 cars. We had 14 or 15 cars, probably, in the aggregate.

Q. Over a period of 4 years?

A. Yes. You are referring exclusively to this Carmelita property?

Q. Yes. And you got all those from 5 acres?

A. Yes; it is probably understated.

Q. Have you any interest at the present time in this Carmelita property? A. None, whatever.

Q. When did you dispose of the property?

A. The end of 1921.

Q. To whom?

A. The property was purchased by the Dwight Lumber Company and California Pine Box Distributors.

Q. You don't know where the cuttings or wood came from from which these grapes were grown, do you? A. Yes, I do.

Q. Where did they come from?

A. They were obtained through George Roeding's place on Bellmont Avenue near Fresno.

Mr. LOFTUS.—That is all.

(Witness excused.)

Mr. CONLEY.—Your Honor, I would like to add another part to the exhibit, or offer it as a sepa-

(Testimony of Fernand de Journal.)
rate exhibit. I overlooked this. It is a newspaper clipping advertising "Lady Finger" grapes.

Mr. LOFTUS.—That is immaterial. That is dated January, 1928. [77]

Mr. CONLEY.—I suppose that would go to the weight of the testimony. However, I offer it as a part of the other exhibit, whatever it may be.

The COURT.—Overruled. You had better mark that as a separate exhibit.

(The paper referred to was received in evidence and marked Defendants' Exhibit "F.")

TESTIMONY OF FERNAND DE JOURNAL, FOR DEFENDANTS.

FERNAND DE JOURNAL, called on behalf of defendants, after being first duly sworn, testified as follows:

I have been an attorney for forty years. I have now retired and I look after land and vineyards. I am interested in the Carmelita Vineyards. I sold part of it to Mr. Setchel, first, and it is now the property of the Dwight Lumber Company. I look after it, however, manage it, and have done so since 1921. I am familiar with the variety of grapes that are being grown on that vineyard at the present time and that have been grown there since 1921. Included in my varieties I have grapes that are commonly known and designated as "Lady Fingers." I have about twelve acres of these grapes. I ship them under the name "Lady Fin-

(Testimony of Fernand de Journal.)

gers.” So far as I am aware, they are known in Fresno County only as “Lady Fingers.”

Q. And how does the trade and the people generally speak of that variety; what name do they give it?

Mr. LOFTUS—That is objected to as calling for the opinion and conclusion of the witness.

The COURT.—If you know. Overruled.

A. “Lady Fingers.”

Mr. CONLEY.—I think that is all. You may take the witness. [78]

Cross-examination.

Mr. LOFTUS.—Q. You have been notified by attorneys representing the A. B. Humphrey Company that you were infringing the “Lady Finger” trade-mark, have you?

A. I do not recall the terms of the letter, Mr. Loftus. I know, however, that I received a letter from your firm to the effect that Mr. Humphrey claimed the sole right to call these grapes “Lady Finger” grapes. I received that letter, I think, in 1926 or 1927. I rather think it was 1926. I am not sure which year it was.

Q. And since you have been in charge of this Carmelita property altogether how many crates or carloads of these grapes have you shipped bearing the name “Lady Fingers”?

A. Well, that is very hard to say from memory. The first two years we shipped about five or six cars, and when we increased the acreage from about

(Testimony of Fernand de Journal.)

4 or 5 acres, that were being grafted on other grapes to 12 acres, we have been increasing the shipments of cars. The first two years there were very little, but now we get about 6 tons to the acre in the new planting and about, I should say, 8 tons to the acre in the old acreage. It is a matter of computation from those data.

The COURT.—Q. You might estimate it, Mr. de Journal. You said you had 12 acres, or had increased your acreage to 12 acres; that you had 4 or 5 acres when you took charge?

A. Yes, when I took charge. Maybe it was 6—5 or 6 cars.

Q. You say you were shipping how many carloads a year,—5 or 6?

A. No. For the first two years we shipped 5 or 6 carloads and since that time we have increased the shipments; and I would say the last year, I think we shipped 10 carloads about. They did not go by carload last year. They went by truck to Los Angeles.

Q. That is an estimate, anyhow?

A. An estimate, yes. But I should say altogether 25 carloads. [79]

Mr. LOFTUS.—Well, how far apart are those vines planted to the acre? A. Ten by twelve.

Q. Now, you have heard this grape that you refer to as the “Lady Finger” grape designated as the Olivette Blanche, have you not?

A. I heard that lately. I never heard that before.

(Testimony of Fernand de Journal.)

Q. Are you familiar with the recent catalogues put out by this Fancher Creek Nurseries?

A. No, sir. I have no reason to look up catalogues.

Q. When did you first hear the designation "Lady Finger" applied to grapes? A. In 1916.

Q. That is the first occasion?

A. Yes. I suppose I must explain that. I owned 90 acres of that vineyard and sold it to Mr. Stechel. That was in 1916, or perhaps the beginning of 1917. At that time I went all through the vineyard and that was the first time that I saw these "Lady Fingers." That was either in the fall of 1917 when they were on the vines or the fall of 1916. I cannot remember positively.

Q. Prior to that time were you familiar with Mr. Humphrey's operations?

A. No. I never heard of Mr. Humphrey until you wrote me a letter. We had to ship these grapes under that name since I handled it because the Horticultural Commissioner would not permit them being called by any other name.

Q. You could *could* them "Rish Baba," as called for in the State law?

A. I didn't know anything about "Rish Baba." I only heard that name since this trial occurred.

Q. You could satisfy the law with calling them a small white variety, could you not?

A. No, I don't think so.

Mr. LOFTUS.—That is all.

(Testimony of Fernand de Journal.)

Redirect Examination.

Mr. CONLEY.—Q. Mr. de Journal, you paid no attention to [80] his letter, did you?

A. Well, I always pay attention to a reputable firm when they write me a letter; but I could not ship the grapes any other way, Mr. Conley. I could not ship them at all. I could not call them anything else.

Q. Did you make any reply to his letter?

A. I forget now. I think I might have acknowledged the letter. That was the courteous thing to do, but I did not stop shipping these grapes because we had to dispose of them in some way and the Government authorities, the Government inspectors, would not take any other description except the description that was authorized, you see?

Mr. CONLEY.—That is all.

(Witness excused.)

TESTIMONY OF ROBERT DE JOURNAL,
FOR DEFENDANTS.

ROBERT DE JOURNAL, a witness called on behalf of defendants, after being first duly sworn, testified as follows:

I am 37 years of age; my occupation is packing and shipping fruit in Fresno County for the Carmelita Vineyard. When not so engaged I am an attorney at law, admitted in 1916, I believe. I know the variety of grapes known as the "Lady Finger" grape. I have seen those grapes grown in Fresno

(Testimony of Robert de Journal.)

County on the Carmelita Vineyard. I have also seen them on the Frank H. Wilson place; and I don't recall having seen them any other place. I will describe the variety of grape to the Court, as a long, slender, white variety, with very firm meat; brittle, sort of brittle meat to eat; crisp. That is about all. They are a somewhat long, pointed, grape. I never knew any other name for that variety of grape. In the handling of them I have always known of them as a "Lady Finger" grape. I have made shipments under that name, from Fresno County to Eastern points—Chicago, New York, and some local points. Also Los Angeles.

Mr. CONLEY.—Take the witness. [81]

Cross-examination.

Mr. LOFTUS.—Q. Have you ever known of a variety called "Olivette Blanche"?

A. Personally, I don't know the Olivette Blanche. I could not identify one if I saw one.

Q. You have heard the name?

A. I have heard the name mentioned in connection with grapes, but I wouldn't know an Olivette Blanche if it was presented to me. I couldn't say that it was an Olivette Blanche.

Q. Likewise, you have heard the name "Rish Baba"?

A. Yes, since this trial was brought up, I have heard those names mentioned.

Mr. LOFTUS.—That is all.

TESTIMONY OF K. ARKELIAN, FOR DEFENDANTS.

K. ARKELIAN, a witness called on behalf of defendants, being first duly sworn, testified as follows:

I live in Madera County and am a vineyardist; fruit shipper. I also purchase and sell grapes. I control about 5,000 acres of vineyard.

Q. Do you grow any "Lady Finger" grapes?

A. I have a few vines up home in the family garden. I have been acquainted with that variety of grape for about 45 years. I saw that variety of grape when we first came to Fresno and picked grapes on the Eisemann Vineyard. It was being grown at that time on the Eisemann Vineyard under the name of "Lady's Finger."

Q. Did you ever know that variety before you came to this country or after you came and went back? A. Yes, sir.

Q. Where is it grown?

A. Around Constantinople.

Q. And what is the name of the grape back there that is grown near Constantinople?

A. They call it in Turkish, "Hanan Parmaghy."
[82]

Q. And are you able to translate that term for us?

A. The translation of that is "Lady's Finger."

Q. When did you see that variety of grape in Turkey,—what year?

A. It was 1895. I bought some.

(Testimony of K. Arkelian.)

Q. Was it before or after the month of September?

A. I think it was in the month of August, when I was coming back.

Q. Do grapes mature in Turkey about the same time of year as they do in California?

A. About the same time.

Q. And was that the same variety of grape which you saw grown on the Eisemann Vineyard?

A. Yes, sir.

Mr. CONLEY.—Take the witness.

Cross-examination.

Mr. LOFTUS.—Q. What relation are you to the defendant, Ben H. Arkelian?

A. I am his brother.

Q. Tell us a little something more about this Eisemann Vineyard. Now, in what part of the vineyard did you see these grapes growing which you say were then called “Lady’s Finger”?

A. Well, Eisemann’s Vineyard, they have a winery and they have a residence and there is a big avenue between the winery and the buildings. It is a little nearer to the avenue, on the east side of the avenue.

Q. On the east side of the avenue?

A. Yes, as far as I remember, that is where it was located.

Q. And this was in what year? A. ’83.

Q. 1883? A. Yes, sir.

(Testimony of K. Arkelian.)

Q. And they were on the east side of the avenue; is that your testimony?

A. That is my recollection.

Q. And those grapes were then called "Lady Fingers," were they? A. Yes, sir. [83]

Q. And how old were you at that time?

A. Fifteen years old.

Q. And were those grapes shipped under that name?

A. Well, I don't know whether they shipped them or what they done with them. They were picking the grapes.

Q. In what way did you hear them called "Lady Fingers"?

A. The foreman called them "Lady Fingers." They had different kinds of grapes. They had wine grapes. They were packing different kinds of grapes and when they came to those white grapes they called them "Lady Fingers."

Q. What was the foreman's name?

A. Mr. Baber.

Q. This gentleman sitting over here in the courtroom? Stand up, Mr. Baber. Is that the gentleman?

A. I haven't seen him for a long time. He might be the one. He was the superintendent, but he had a foreman under him.

Q. Now, how long had you been in this country? You say 1883?

A. That is the first year we came to this country.

Q. And did you speak English at that time?

(Testimony of K. Arkelian.)

A. A little.

Q. Did you understand English?

A. I understood a little.

Q. Where were you born?

A. I was born in Turkey.

Q. What part of Turkey? A. In Marsoven.

Q. Now, when did you return to Turkey after your first visit to this country?

A. I went back to the old country in '92.

Q. In '92? A. Yes, sir.

Q. You have heard these grapes called Rish Baba, haven't you?

A. No. They were talking about that yesterday.

Q. And also Olivette Blanche,—you have heard them called that, haven't you?

A. They were speaking about that yesterday.

Mr. LOFTUS.—I think that is all.

(Witness excused.) [84]

TESTIMONY OF MARK COSULICH, FOR DEFENDANTS.

MARK COSULICH, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

I was born in Dalmatia, Jugo-Slovakia. I have lived in the United States about 36½ years, and am a citizen thereof. I have resided in Fresno County, and am familiar with a variety of grapes grown there during that time known as "Lady Finger" grapes. I first saw them in 1917 or '18 in Fresno County. I can't say exactly where, but I

(Testimony of Mark Cosulich.)

have seen them down there. I never knew them by any other name than "Lady Finger" grapes. I have seen that variety of grapes where I was born. They had a Slavonic-Italian name as well, for them, which in translation means "Lady Fingers." I first remember seeing this particular variety of grapes when I was either 9 or 10 years of age. The first visit I made to the City of Spalato, a city of about 75,000 population, and the largest in Dalmatia. I went there for the late holiday season at Christmas-time and I went to a market there and I saw these peculiar grapes. I thought I had never seen any like that before, and I remember my father telling me they were originally grown in Persia or Northern Africa, and called them the name "Lady Fingers." I have not dealt in any "Lady Finger" grapes since coming to the United States. I am a grape shipper. I have also grown some, but I specialize in juice grapes. I never shipped any of these grapes.

Mr. CONLEY.—Take the witness.

Cross-examination.

Mr. LOFTUS.—Q. When did you first come to Fresno?

A. On Thanksgiving Eve in 1897 I went there the first time.

Q. Did you visit this Eiseman vineyard at any time thereafter?

A. Yes. I went out to the Eiseman vineyard on several Sundays with the family that I lived with.

(Testimony of Mark Cosulich.)

In 1897 and '98 there was a family by the name of Aguirre that I lived with and on several [85] occasions on Sundays I went out with that family to the Eiseman vineyard.

Q. And at that time did you ever hear of or see any of these grapes marked "Lady Fingers"?

A. I did not see any mark on them at that time but I was told they were "Lady Fingers." I have seen the grapes right in the place.

Q. You mean that you saw an elongated grape being grown there; is that what you mean by that?

A. Yes, sir.

Q. And, recently, you have been told it was a "Lady Finger" variety; is that correct?

A. I knew it at that time because I seen them as a boy and then I made a study of grapes 20 years ago, taking a year's course in viticulture.

Q. Where did you make this study?

A. In the city of Spalato,—Dalmatia.

Q. What was this foreign word that you called the grapes when you were a boy 9 or 10 years old?

A. "Gospodje Perst," which means "Lady's Fingers."

Q. Have you been back to that country since you left there as a child 9 or 10 years old?

A. Yes, sir. I left here in April, 1907, and I returned in July, 1908. I was there over a year.

Q. But the first time you heard the name "Lady Fingers" in this country was in 1917 or '18, was it?

A. No. I heard that when I lived in Fresno in

(Testimony of Mark Cosulich.)

1897 and 1898, before I was ever engaged in the grape shipping business.

Q. Didn't you testify on direct examination that the first time you had ever heard this name applied to the grape in this country was in 1917 or '18?

A. No, I did not. I don't think I did. You see, I seen them there on the Eiseman Vineyard when I was there on Sundays with this family. But before I was ever in the grape shipping or grape growing business,—any business at all,—I saw [86] them several times in 1917 and 1918 and several times after that.

Q. Are you related to the defendant Ben H. Arkelian? A. Not at all.

Mr. LOFTUS.—That is all.

Redirect Examination.

Mr. CONLEY.—Q. How old are you?

A. Fifty years last March.

Q. You say you have made a study of the different varieties of grapes? A. More or less.

Mr. CONLEY.—That is all.

The COURT.—Q. Did you eat any of these grapes in the old country?

A. Yes.

Q. And you ate them on the Eiseman ranch, did you? A. Yes.

Q. And could you be mistaken as to the flavor or anything of that kind?

A. No. They are the same variety of grape.

Q. The same variety? A. Yes.

(Testimony of Joseph Arkell.)

Q. You are positive of that?

A. Yes, sir.

(Witness excused.)

TESTIMONY OF JOSEPH ARKELL, FOR DEFENDANTS.

JOSEPH ARKELL, a witness called on behalf of the defendants, after being first duly sworn, testified as follows:

I am a brother of Ben H. Arkelian, the defendant in this action. I have lived in Fresno and now reside in Oakland. I have lived in Oakland 10 years or more. Prior to that, for 5 or 6 years I lived in Turlock, Stanislaus County. When I first came to Fresno, I was 9½ or 10 years of age. I know the variety of grape commonly known and designated as "Lady Fingers." Between 35 and 38 years ago I purchased these grapes on the Margarita Vineyard, when I was a mere boy peddling grapes. I was a grape peddler around Fresno. I sold the grapes as "Lady Fingers." I have been on the Eiseman Vineyard. I haven't any recollection that there were "Lady Finger" [87] grapes being grown there; but I know they were grown on the Margarita Vineyard. I did not purchase and resell many "Lady Finger" grapes. I guess 3 or 4 boxes of that variety. I have eaten these grapes, but not lately. It was probably a couple of years ago.

Q. And were they the same variety that you had consumed some 35 or 36 years previous to that?

(Testimony of Joseph Arkell.)

A. Yes, sir.

Mr. CONLEY.—Take the witness.

Cross-examination.

Mr. LOFTUS.—Q. Where is the Margarita Vineyard?

A. East of Fresno, between Sunnyside and Sanger railroad, they used to call it.

Q. Who was operating that vineyard when you first purchased grapes there?

A. I don't know; the owners, I suppose. I got them from their foreman.

Q. Do you know the names of anyone connected with the vineyard at that time? A. No.

Q. In what form did you buy the grapes? Did you purchase the grapes?

A. I used to have my empty boxes and I would pick and fill them, put them in my boxes and then peddle them.

Q. And there was no name on the box whatever, then, was there?

A. Probably there was our name on it.

Q. Your name?

A. Yes. I used to carry around boxes and fill them with grapes, put the grapes in our own boxes.

Q. But there was no name "Lady Fingers" affixed or stamped on the box, was there? A. No.

Q. And you didn't see any boxes or packages around there at that time bearing the name "Lady Fingers," did you? A. No.

(Testimony of Joseph Arkell.)

The COURT.—Q. When you would go to buy grapes, what did you ask for?

A. I asked for those long, white, grapes and he says [88] “Lady Fingers”? and I said “Yes.” So I learned from him there that it was “Lady Fingers.”

Mr. LOFTUS.—Q. Who was this gentleman that you learned that from?

A. The Margarita Vineyard foreman.

Q. What was his name?

A. The foreman or owner. I don't know the name,—the man in charge. Those grapes were right close to the buildings, close to the farm houses.

Q. And you can't recall to-day the name of any individual that told you that was the “Lady Finger” grape? A. No, I don't know his name.

Q. You don't know his name? A. No.

Q. How old were you at that time?

A. Between 15 and 20 years, I should judge; between 15 and 18; because that is the time I followed that occupation.

Q. Then you can't fix the date within 3 years?

A. Well, yes, in that neighborhood.

Q. That would be between what years?

A. Well, if I was 15—if I was 15 years old, it would be 40 years ago, and if it was when I was 18 years old it would be 37 years ago.

Q. And you don't know which it was? A. No.

Mr. LOFTUS.—That is all.

(Testimony of Joseph Arkell.)

Redirect Examination.

I quit peddling grapes when I was about 19 or 20 years old. That was over 35 years ago.

Mr. CONLEY.—That is all.

(Witness excused.)

TESTIMONY OF BEN H. ARKELIAN, FOR
DEFENDANTS.

BEN H. ARKELIAN, one of the defendants, a witness on behalf of defendants, being first duly sworn, testified as follows:

I reside in Modesto, California. I am 43 years of age. [89] I was born in Fresno, California, and lived there all my young life. I am now a grape grower and shipper. I have a little over 2,000 acres of grapes of many varieties growing at the present time. I know the "Lady Finger" grape. I have been growing that grape since 1920. Prior to that time I never made any sales of "Lady Finger" grapes. I have about 110 acres of "Lady Finger" grapes growing. Prior to the institution of this suit, I never heard that particular variety of grapes called by any other name than "Lady Finger." I first saw this variety of grape in my boyhood days when I was approximately 10 years of age. That was on the Eiseman Vineyard. At that time my father told me the name of the variety of grapes. He gave me the translation of the Turkish or Armenian word meaning "Lady Finger." I made a shipment of grapes to Port-

(Testimony of Ben H. Arkelian.)

land, as testified to by Mr. Humphrey. I think there was approximately 200 boxes in the car. That would be about a fifth of a carload.

Q. Did you cut any prices on them up there?

A. I did not.

Q. I will ask you—and you say you have been shipping these grapes for the last 5 or 6 years—under what brand have you been shipping them?

A. “Enchantress” Brand.

Q. This is a sample, I presume, of your brand?
(Handing the witness a label.) A. Yes, sir.

Q. I will ask you if you have, during all that time, shipped the grapes with the idea of imposing on anybody or making them believe they were Mr. Humphrey’s “Lady Finger” grapes?

Mr. LOFTUS.—That is objected to—

The COURT.—Overruled.

A. I did not.

The COURT.—A. That form of label you have in your hand, do you use that for all brands you have?

A. All. [90]

Q. And then you have a rubber stamp to indicate the variety?

A. Sometimes in rubber stamp and sometimes in printing.

Q. Do you use that same label for other grapes?

A. Yes, sir. I use this label for other grapes,—all other grapes.

Q. And if it is another variety of grape you put

(Testimony of Ben H. Arkelian.)

a different name on it,—either stamp it on there with a rubber stamp or print it on; is that it?

A. Yes. In this case there was a Carignane label, printed by the lithographing company, which has been scratched out and Lady Finger printed here. (Indicating on label.)

Q. I mean you have one style of label for all your grapes?

A. Yes; one style of label for all grapes.

Mr. CONLEY.—I will ask you whether or not the Carignane grape is entirely different, an entirely different grape than the “Lady Finger” grape?

A. Yes; and it has a different mark.

Q. How many carloads of grapes—

A. (Interposing.) The only thing we have for it, representing grapes, are some small, round, grapes, representing earrings for the ladies. (Referring to the label.)

Q. This label was not made there with the idea of reproducing any “Lady Finger” grapes?

A. None, whatever.

Q. They are not shaped at all like the “Lady Finger” grapes, are they? A. No, sir.

Q. Why did you use that rubber stamp; what is the reason for that, Mr. Arkelian?

A. Well, we have used the rubber stamp at such times as we did not have printed labels; that we would be out of printed labels with the word “Lady Finger” on them.

Q. Well, isn't there a legal requirement to do that?

(Testimony of Ben H. Arkelian.)

A. The County and the State require us to put the name on the variety of the grape on each container. [91]

Mr. CONLEY.—I think that is all.

Cross-examination.

Mr. LOFTUS.—Q. Will you describe the location of the Eiseman Vineyard where you saw these grapes growing when you were 10 years old and which you say were called “Lady Fingers”?

A. To the best of my recollection it was the east side of the driveway going to the winery, near Fancher Creek, a canal going through there called Fancher Creek.

My father was a grape grower, when I was 10 years of age. He was not connected with the Eiseman Ranch. He had a place near the Eiseman Ranch, immediately across from the Roeding Nursery. I think it was in 1916 when I saw grapes packed in boxes and bearing the name “Lady Finger.” I saw them at the fair here in 1915, I believe. I don’t know whose grapes they were. I think they were grown in Exeter or Strathmore. I first heard of the “Lady Finger” grapes grown by Mr. Humphrey in 1919. I got the cuttings or wood from which I grew the grapes called “Lady Fingers,” from Mr. Lake, the constable at Escalon. I bought the brush on his vines for a number of years; also other people who had odd vines that Mr. Humphrey had given grape vines to. My fore-

(Testimony of Ben H. Arkelian.)

man tried to buy cuttings from Mr. Humphrey, but he didn't succeed.

Q. Now, you are familiar with the manner in which the retail dealer sells these grapes, are you not? A. Yes, sir.

Q. What is the usual manner? Isn't it true that he removes these grapes from the lug boxes and puts them in trays and displays them with a little card or sign in the window reading "Lady Fingers"?

A. In some cases. Most cases they are kept in the container.

Q. Doesn't the purchaser, so far as you know, as far as you have observed, buy these grapes in bunches or by the pound, [92] ordinarily, out of a window display tray,—does he not, or out of the boxes? The grapes cannot be handled any more than can possibly be helped. In some cases the dealers may put them on a stand, take them out of the boxes and lay them on a tray? A. Yes.

Q. And in some cases they put them in a little pile in the window. They pile the grapes up in the window and put a little card or sign on top of the pile reading "Lady Fingers." Isn't that true?

A. No, sir. Mr. Humphrey happened to print a card, but we have any number of grapes that have no variety marked on them whatever.

Q. Did you ever see them displayed in trays with a small card printed "Lady Fingers"?

A. I have not. Not at any time.

Mr. LOFTUS.—That is all.

(Testimony of Ben H. Arkelian.)

Redirect Examination.

Mr. CONLEY.—Q. In what County of the San Joaquin Valley is the “Lady Finger” grape grown, to your knowledge?

A. Pardon?

(Question repeated.)

A. In Kern County, Tulare County, Fresno County, Stanislaus County.

Q. In Kern County, in Merced and Madera?

A. Not to my knowledge.

Q. For all you know, the green stock of your vines might have come from Mr. Humphrey’s place; isn’t that so?

Mr. LOFTUS.—That is objected to as leading.

The COURT.—Overruled.

Q. Do you know where they came from?

A. Yes. Some of the vines I got were off some brush that Mr. Humphrey had given these people. They originally came from Mr. Humphrey’s ranch,—that he had given away,—

Mr. CONLEY.—Q. Did Mr. Humphrey ever attempt—

A. (Continuing.) —and I think I got some from the seed farm at Davis. [93]

Q. Mr. Arkelian, you pay a great deal of attention to grape literature, do you not?

A. Somewhat.

Q. I will ask you if you have ever seen “Lady Finger” grapes advertised in any periodicals or State journals or newspapers in this State?

(Testimony of Ben H. Arkelain.)

A. The Government lists them on their market report. The county or the state inspection bureau writes certificates and calls them "Lady Fingers." Our County Horticulturist at Modesto, as well as Bakersfield, insists that we should put the word "Lady Finger" on the boxes because they are a "Lady Finger" grape.

Mr. CONLEY.—That is all.

Recross-examination.

Mr. LOFTUS.—Q. What year did you first see the "Lady Finger" grapes on the Eiseman Ranch; what was the year?

A. Along about '95,—'98.

Mr. LOFTUS.—That is all.

(Witness excused.)

Mr. CONLEY.—That is our case, your Honor.

Mr. LOFTUS.—I will call Mr. Baber.

PLAINTIFF IN REBUTTAL.

TESTIMONY OF EDWARD I. BABER, FOR
PLAINTIFF (IN REBUTTAL).

EDWARD I. BABER, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I live in San Francisco; I am 74 years of age. From the year 1880 to about 1916 or '17 I was employed at the Eiseman Vineyard. I was manager there.

Q. Did you ever know, during that period, of any grape being grown there on that ranch or vineyard

(Testimony of Edward I. Baber.)

and which was sold under the name of "Lady Finger"?

A. Sold or marked "Lady Finger"? [94]

A. We never had such a grape. The vineyard never had such a grape; not under that name.

Q. Referring now to this variety of grape which is grown on the east portion of the vineyard, what was that grape called?

Q. I had several varieties there.

The COURT.—Q. Well, do you know any variety called "Lady Fingers"?

A. Not that was grown on that vineyard.

Q. Did you ever hear of any grape of that name?

A. I heard of the name.

Q. Do you know what they are referring to here, what kind of a grape? A. Yes.

Q. But they had nothing of that kind on that ranch? A. None, whatever.

Q. Nothing that looked like it?

A. Nothing that looked like it.

Mr. LOFTUS.—That is all.

Cross-examination.

On the Eiseman Vineyard I grew table grapes and wine grapes principally. Of the table grapes there were Malaga, Emperor, Muscat, Thompson Seedless and several other varieties.

Q. What are the several other varieties? There was a long, white grape that you raised there, wasn't there? A. A long, white grape?

Q. Yes. A. We raised a round grape.

(Testimony of Edward I. Baber.)

Q. I will ask you if you didn't raise a long, angular, white grape on the Eiseman Vineyard?

A. A White Cornichon, we raised, yes.

Q. White Cornichon? A. Yes.

Q. Describe that White Cornichon grape?

A. It is a grape,—a rather long grape, meat very hard and very light. [95]

Q. Why did you call that a Cornichon?

A. Beg pardon?

Q. I say, why do you call that a Cornichon?

A. I don't know why it was called "Cornichon." It was the name I knew it under.

Q. Did your ranch purchase the cuttings, or did you, personally, purchase the cuttings for those vines? A. No, I did not.

Q. That was planted there before you came there, wasn't it? A. It was planted there, yes.

Q. And you went there in 1880, didn't you?

A. 1880.

Q. And were those grapes sold in Fresno?

A. No.

Q. What became of them?

A. They were picked with other grapes and used for distilling purposes, for making brandy.

Q. Were they sold at all? A. Never.

Q. Did you ever see any grapes sold on the Eiseman Vineyard? A. Yes.

Q. Did you ever sell any white varieties?

A. Several white varieties.

Q. You sold Cornichons, didn't you? A. No.

Q. Did you sell any other variety?

(Testimony of Edward I. Baber.)

A. We sold that grape called "Palomino Blanco."

Q. That is a long, white grape, isn't it?

A. No, sir; it is a long, oval-shaped grape. It is of the Malaga family. It is a variety that we planted for making sherry, for making wine. That was the original purpose of planting that grape.

Q. And were those grapes grown on the east side of the road, or on what side of the road were they grown?

A. What side of the road were they grown on?

Q. Yes.

A. They were planted on our east line.

Q. On the east line?

A. Yes. On the east line of the section.

Q. And you heard the description given by Mr. Arkelian as [96] to the location of the grapes he saw growing on that vineyard, didn't you?

A. Yes.

Q. And did he give the correct description as to the location of the Cornichon grapes grown to the east of the avenue or road?

A. We had no Cornichons growing there. I only had four vines of the Cornichon variety in the vineyard, in the nursery.

Q. I will ask you to take a look at these—please take a look at this label, this picture here, and say whether there were any grapes of this shape growing on that vineyard?

A. I had a grape somewhat similar to one of these.

Q. And what did you call that?

(Testimony of Edward I. Baber.)

A. Zabalkanskoi.

Q. Will you describe this grape to the Court?

A. They are a red grape, long and very meaty, and narrow.

Q. That is all I care for. And they were a red grape? A. Yes.

Q. And were there any other varieties of white grapes, other than those you mention, growing on that place?

A. Yes. We had so many different varieties I can't recall them to mind what we did have. We had a nursery of them.

Q. Did you have any Feherszagos?

A. Yes, we had the Feherszagos, another white variety.

Q. You say you did have Feherszagos?

A. Yes.

Q. How are they shaped,—angular or round?

A. No. They were kind of oblong,—an oblong grape, somewhat; very deep skinned; they were all wine grapes. They were used for wine purposes.

Q. These Cornichons that were grown there resembled that grape? (Showing witness a label.)

A. They were not as long as that.

Q. Well, they were about that shape, about the same shape, weren't they?

A. Well, somewhat similar to that.

Q. Somewhat similar to this?

A. Somewhat similar to that one, yes.

Mr. CONLEY.—That is all. [97]

(Testimony of Edward I. Baber.)

Redirect Examination.

Mr. LOFTUS.—Q. And they were always called “Cornichons,” were they, Mr. Baber?

A. Yes. I say, we had 4 vines of this variety.

Q. Are you familiar with the adjoining ranch there in Fresno, known as the Margarita Vineyard?

A. Yes.

Q. Have you ever been over that property?

A. I have been across it from time to time.

Q. During this period between 1880 and 1916?

A. Yes. Several times I have been across it.

Q. And did you ever see a “Lady Finger” grape being grown there?

A. No, I have never known of it being grown there.

Q. Or any grape that was called “Lady Finger” there?

A. No. I never heard any of the parties connected with that vineyard speak of the grape, “Lady Finger.”

The COURT.—Q. When was the first time you heard the term “Lady Finger” applied to a grape?

A. Well, I have heard the word “Lady Finger” on the vineyard, I believe.

Q. How long ago?

A. It must have been somewhere during my time that I was on the vineyard. I couldn’t specify what year it was. In the course of conversations with other gentlemen that came on the vineyard,—they spoke about grapes and possibly the “Lady Fingers” came up during those conversations.

(Testimony of Edward I. Baber.)

Q. Would that be from the beginning of your managership of the ranch?

A. Some time during it.

Q. During the early or late part?

A. I couldn't say that; I can't remember.

Q. When you spoke in an undertone just a moment ago I thought I heard you say 1890?

A. No, I couldn't say definitely. If it had been mentioned it was just in the course of conversations.

[98]

Q. You would remember whether it was in 1890 or 1916, wouldn't you?

A. It wasn't in 1916; I am positive of that.

Q. It was long before that, was it?

A. It must have been whilst I was on the vineyard. It must have been.

Q. Well, you have been in the grape business all your life, haven't you? A. Pretty nearly.

Q. Now, you can't say when you first heard the word "Lady Finger" applied to a grape?

A. No, I couldn't say.

Q. Have you always heard that name applied?

A. Beg pardon?

Q. Have you always heard it applied to grapes?

A. No. I suppose in speaking of different varieties that name might have come up, "Lady Fingers," but it is a grape that is very seldom spoken about. I very seldom heard the name mentioned, "Lady Fingers," but I have heard it.

Q. But you could not fix the time when you heard it? A. No, I could not.

(Testimony of Edward I. Baber.)

Q. Would you say it was within 10 years after you went on to the Eiseman Vineyard in 1880; would you say it was between 1880 and 1890?

A. I could not tell you sir.

Q. You could not say? A. No.

Q. Anyhow, it is nothing new, is it?

A. Well, it is something that came along and passed from my memory entirely, the name of the grape. I never took up—never mentioned the name particularly—never spoke about it very much.

Mr. LOFTUS.—You didn't have any "Lady Finger" grapes on that place, did you?

Mr. CONLEY.—Just a minute. What was that? (Question read.)

A. We didn't have any.

Q. If it can be said that this Cornichon grape is a "Lady [99] Finger" grape or looks like a "Lady Finger" grape, you only have 4 vines of that?

A. Yes.

The COURT.—Q. The Cornichon does look something like the "Lady Finger" grape, does it not?

A. Yes. We had those 2 varieties, the red and the white. We had a nursery in which we had 4 vines of each kind.

Q. And the first time you heard the name "Lady Finger" mentioned as applied to a certain variety of grape, was down there on that Eiseman ranch, was it?

A. Yes, sir. It must have been down there.

Mr. LOFTUS.—That is all.

(Testimony of Edward I. Baber.)

Mr. CONLEY.—Q. You and I have lived down there in that county for a long time, haven't we?

A. Yes, sir.

Q. Let me refresh your recollection now. I think I can do it.

Q. Do you remember the first time you saw the grape called the "Lady Finger" grapes?

A. I never saw one.

Q. You never saw one in your life?

A. Never saw one.

Q. When was the first time you ever saw a grape that looked like this (showing witness an illustration)?

A. I never saw one, outside of the Cornichons.

Q. Well, we will call it the Cornichon, then.

A. That is the nearest resemblance I have seen to it.

Q. Haven't you ever seen grapes like this for sale in Fresno County as early as 1884?

A. No, I have not, indeed.

Q. Did you ever see these so-called "Lady Finger" grapes in boxes for sale in Fresno as early as 1890?

A. I have never looked at them, sir.

Q. You never saw these so-called "Lady Finger" grapes,—and you can call them Cornichons, if you want to—didn't you see [100] these grapes on sale in Fresno as early as 1890?

A. No, sir.

Q. Or 1900? A. No, sir.

(Testimony of Edward I. Baber.)

Q. You came to Fresno, frequently, didn't you, during that time?

A. Yes; but I didn't take any notice of it. I attended to my business, and that grape not being connected with me, didn't take my attention or didn't attract my attention in any way.

Q. How many varieties of grapes did you raise on the Eiseman ranch?

A. I raised, I guess I raised—I guess I had 250 varieties.

Q. You had 250 varieties, and you had a few vines of these "Cornichons," as you call them, and quite a large acreage of the other, and, as a matter of fact, you didn't pay any attention to the grape itself, did you? A. Yes, we did.

Q. We did. But I mean you, personally?

A. Yes.

Q. What was your business there?

A. To find out the grape most suitable for wine.

Q. You were a wine producer?

A. Wine grape producer and viticulturist.

Q. Did you ever see any grapes that looked like this (showing witness an illustration) on sale in Fresno between 1880 and 1890?

A. On sale in Fresno?

Q. Yes. A. I don't remember.

Mr. CONLEY.—That is all.

(Witness excused.)

TESTIMONY OF S. A. LINES, FOR PLAINTIFF (IN REBUTTAL).

S. A. LINES, a witness called on behalf of plaintiff, in rebuttal, being first duly sworn, testified as follows:

I live in San Francisco. I am a fruit shipper and vineyardist—grower. My properties are located in Fresno County. [101] I have been connected with the Earl Fruit Company since about 1902 or '03 and I have that number of years' experience in grape-growing, or in connection with it. Prior to that time I lived in Fresno, but had nothing to do with the fruit business. I am familiar with Eiseman ranch, near Fresno. I was manager of the Earl Fruit Company,—I was local agent in Fresno for the Earl Fruit Company, about 1902 or '03 and the Earl Fruit Company handled all the table grapes from the Eiseman Vineyard from that time until it was sold. I have been over that property many times. In that connection I never saw or heard of any grapes called "Lady Fingers" being grown there. I am familiar with the east line portion that has been referred to here. I knew of no grapes grown on that portion or on the Eiseman Vineyard called or marked "Lady Fingers." I think I first became acquainted with the words "Lady Fingers" when Mr. Humphrey made his plantings at Escalon. That must have been about 1912 or '13, during 1914, possibly; along in there. I am acquainted with the other vineyard

(Testimony of S. A. Lines.)

that has been referred to here, the Margarita Vineyard. I have probably been over that property also, but not often; very seldom. I never heard of any "Lady Finger" grapes being grown on the Margarita Vineyard.

Q. Did you handle a grape, or did you, while you were connected with the Earl Fruit Company, which had somewhat the appearance of the grape which is shown here in this exhibit, Plaintiff's Exhibit 2?

A. We handled Mr. Humphrey's account or his grapes for a few years. I became familiar with the grape when we handled his account at Sacramento.

Mr. LOFTUS.—That is all.

Cross-examination.

Mr. CONLEY.—Q. How long did you live in Fresno?

A. I lived in Fresno—I came there in 1888.
[102]

Q. And you left, when?

A. About 1914 or '15, I think.

Q. Did you ever hear of the term "Lady Fingers" being applied to grapes up there during your residence there? A. Fresno, you mean?

Q. Yes.

A. Not until I became acquainted with Mr. Humphrey.

Q. Did you ever hear it there, ever hear the word "Lady Fingers" applied to grapes; or did you

(Testimony of S. A. Lines.)

ever see any "Lady Finger" grapes for sale in Fresno? A. I did not.

Q. Did you ever observe these fruit stands that are on the street there?

A. I presume I have, as I passed them.

Q. Would you know a "Lady Finger" grape if you saw one? A. Yes.

Q. Did you ever see any grapes that looked like these grapes, grown in Fresno? A. Yes.

Q. Where?

A. I don't recall where, but I have seen grapes that looked like them.

Q. You have been out on the Carmelita Vineyard, have you not? A. Yes.

Q. Didn't you see a grape that looked like that grown there?

A. I don't know. I have never been over the Carmelita Vineyard. I just passed through.

Q. Did you make any inquiry at any time while you were on the Carmelita Vineyard as to whether or not there were "Lady Finger" grapes grown there? A. No.

Q. Did you make an inquiry as to whether or not there were any "Lady Finger" grapes grown in Fresno or Tulare Counties? A. No, I did not.

Q. Why, you shipped these very grapes, did you not, in the Earl Fruit Company, shipped them east and under the name "Lady Finger," did you not?

A. No. [103]

Q. There were no grapes that were ever shipped

(Testimony of S. A. Lines.)

by the Earl Fruit Company from Fresno with the name "Lady Fingers" designated on the boxes?

A. Not to my knowledge.

Q. Well, you would know if there were, wouldn't you? A. Yes.

Q. And you are prepared to say there were not?

A. I—not to my recollection. I never saw the grape until I was on Mr. Humphrey's place and saw his vines.

Q. Did you ever see them afterwards in any other vineyard? A. Yes.

Q. Where?

A. In the northern part of the state, I think. I think there are a few vines, probably, along the American River up there.

Q. Along the American River?

A. Yes, not in any quantities, however.

Q. By what name are they known there?

A. I don't know; they don't ship them.

Q. Did you ask what the name was? A. No.

Q. You didn't ask what they were when you saw them? A. Yes, I did.

Q. What were they?

A. They were the same grapes as Mr. Humphrey had, known as "Lady Fingers."

Q. Did you ever see any in any of the Southern Counties? A. No.

Q. You have been in Exeter, and you have also been in Lindsay, haven't you? A. Yes.

Q. Don't you know, or did you ever hear of any being grown up there? A. Not to my knowledge.

(Testimony of S. A. Lines.)

Q. Or in Kern County or Tulare County?

A. Not to my knowledge.

Q. Or Sutter County? A. No.

Q. You never heard of them being grown there, either? A. No. [104]

Q. Did you ever see any grapes in the San Joaquin Valley, either on the vines or in boxes or trays, other than Mr. Humphrey's, that bore a resemblance to these grapes? A. Yes.

Q. Where?

A. I don't recall the vineyards, but I have seen them. The White Cornichon resembles that grape, mostly in appearance, or mostly on the color; the White Cornichon is a large grape at the upper end of the berry and small at the point.

Q. What is the part of the business of the Earl Fruit Company that you were entrusted with?

A. I was the general manager for about 10 years.

Q. Did you go out and examine vineyards?

A. Not very much.

Q. Not very much. You stayed in the office, did you not, Mr. Lines? A. Yes.

Q. And sent the boys out to look them over?

A. Yes, of course, they did most of it.

Q. And you are not a grape expert?

A. Well, I might be very modest in that. I have had a great deal of experience in growing grapes. I have been connected with the grape business for the last 20 years.

Q. And you can tell the different varieties immediately on seeing them, can you? A. Yes.

(Testimony of S. A. Lines.)

Q. Can you tell us the difference in the appearance between the Cornichon and the appearance of one of these "Lady Fingers"?

A. Just as I have described it in the shape of the berry.

Q. Are you acquainted with the Rish Baba grape?

A. Not by that name.

Q. You never heard that term in your life before, did you? A. Not that name.

Q. Do you know anything about the Pizzutello di Roma? A. Yes.

Q. Does that resemble this grape, the "Lady Finger"? A. No. [105]

Q. In what respect does it differ?

A. The Pizzutello di Roma grows about like that (referring to illustration)—this grape (indicating).

Q. Yes. It grows straight.

A. No; just like a finger, straight out, almost as large as the lower point of the grape as it is at the upper end.

Q. Is there any variation at all between the upper half of the grape and the lower half of the grape? Is that smooth, or does it run in that shape?

A. No; that isn't it. The grape is much like your finger. It is much the same size all the way down.

Q. Does it come in in the center?

A. No; not the "Lady Finger."

Q. Not the "Lady Finger." Does it bulge out or does it resemble this shape? (Indicating.)

A. No, I wouldn't say so. The "Lady Finger"

(Testimony of S. A. Lines.)

is a long grape. That (indicating) is rather a small, round, grape.

Q. Just take a look at these (handing witness illustrations) and tell us which grape these shapes resemble?

A. Well, I should think it resembles this grape probably more than any of them. I don't think either one of them would resemble the grape. It would be nearest to that (indicating).

Mr. CONLEY.—I might submit to your Honor that it is a rather strange thing. We have here introduced in evidence a picture of a bunch of grapes introduced by the plaintiff and we have another one, another picture which shows a different shape and the witness now refers to the Khandahar grape as the real shape of the "Lady Finger" grape.

Q. (By Mr. CONLEY.) Did you ever cultivate any grapes yourself—raise them?

A. Yes, I have a vineyard.

Q. Is there a difference in the shape of grapes of the same variety that are grown in the San Joaquin Valley, the same variety of grapes grown in different places in the San Joaquin Valley?

A. I don't think so; not very much. [106]

Q. Would soil and climate conditions make a difference in the shape of the same variety of grapes between Fresno and Escalon, for instance?

A. I shouldn't think so.

Q. Well, do you know.

A. No, I do not know.

Q. Would there be any difference in the shape

(Testimony of S. A. Lines.)

of the same variety of grapes grown in Kern County and Fresno County? A. I don't think so.

Q. Is there any difference in the same variety of grapes,—any difference in the shape of the same variety of grapes grown in Sutter County and Fresno County?

A. I am not familiar with the grapes in Sutter County.

Q. Have you ever been on the Frank H. Wilson vineyard in Centerville Bottoms?

A. Yes, I have been through there.

Q. Did you notice any "Lady Finger" grapes growing there. A. No, I did not.

Q. Would you say there were none grown on that vineyard? A. Yes.

Q. You are certain of that?

A. Well, I never seen them.

Q. You didn't go there for the purpose of making an inspection or finding out whether there were any "Lady Finger" grapes grown on that vineyard, did you? A. I have been over the vineyard.

Q. Did you ever see any "Lady Finger" grapes on that vineyard? A. No.

Q. What does that vineyard consist of; what varieties? A. Almeria, Olivette Vandemian.

Q. Did you go all over that vineyard?

A. Well, I think I have been over it very well.

Q. Wasn't there at least 25 or 40 acres of these "Lady Finger" grapes being grown there?

A. I didn't see them. I never saw them and I have been all over the vineyard.

(Testimony of S. A. Lines.)

Q. You were all over the vineyard and you never saw any "Lady Finger" grapes on that vineyard?

A. No, I did not. [107]

Q. How long ago were you over that vineyard?

A. He has about that acreage of the Olivette Vandemian.

Q. Are they "Lady Fingers"? A. No.

Q. Are they of the same shape?

A. Well, they are rather a long grape, yes.

Q. Do they look like a "Lady Finger" grape?

A. They have a resemblance to it. They don't look like this "Lady Finger" grape, but they have a resemblance.

Q. Well, you are certain, are you, they were not of this variety, the "Lady Finger" variety?

A. Not the grapes that I have reference to, no.

Q. And the Carmelita Vineyard; did you ever see any "Lady Finger" grapes on that vineyard?

A. I have never seen them.

Q. Did you see any white grapes there?

A. Yes.

Q. Long grapes?

A. They have some Thompson Seedless on the Carmelita Vineyard. I have been over the Carmelita Vineyard very little. I am not familiar with it.

Q. I will ask you this question again. Did you see any grapes similar in shape to these "Lady Finger" grapes on the Carmelita Vineyard?

A. I don't recall seeing them, no.

(Testimony of S. A. Lines.)

Q. Were any of the cuttings from the Eiseman Vineyard sold by you? A. No.

Q. Or by the Earl Fruit Company?

A. You mean during the period that the Earl Fruit Company owned the property?

Q. Yes. A. Not to my knowledge.

Q. Weren't there a lot of those vines pulled up?

A. Not while we owned the vineyard.

Q. You have no knowledge of any cuttings being sold to anybody else?

A. They could not have sold any cuttings because we bought the vineyard in July and sold it in December.

Mr. CONLEY.—That is all. [108]

TESTIMONY OF L. ABRAHAM, FOR PLAINTIFF (IN REBUTTAL).

L. ABRAHAM, a witness called on behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

I live at present at 923 Eddy Street, San Francisco. I am just 25 years of age. I was born in Persia and educated at the American College at Urmia, Persia. I have been in the United States about six months now.

The COURT.—What are you going to prove by him, that this is a Persian grape and that the name of it is "Rish Baba"?

Mr. LOFTUS.—Yes.

The COURT.—That is already admitted; that it is a Persian grape, and the name of it.

(Testimony of A. B. Humphrey.)

Mr. LOFTUS.—For the purpose of the record, your Honor—

The COURT.—Well, it has been admitted. Why take up the time of the Court when it has been admitted?

Mr. LOFTUS.—Very well. That is all.

(Witness excused.)

TESTIMONY OF A. B. HUMPHREY, FOR
PLAINTIFF (RECALLED IN REBUT-
TAL).

A. B. HUMPHREY, a witness for plaintiff, previously sworn, recalled, testified as follows:

Direct Examination.

Mr. LOFTUS.—Q. Do you recall and effort on the part of the foreman representing Mr. Ben H. Arkelian in connection with buying cuttings or wood from your place?

A. Yes.

Q. What was that transaction?

Mr. CONLEY.—We object to that, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—What difference does it make, Mr. Loftus? His testimony is that he understood his foreman attempted to get some cuttings and you asked him if he got them and he said “No.” What has that got to do with his case? What difference does it make? [109]

(Testimony of A. B. Humphrey.)

Mr. LOFTUS.—To show he is not selling these cuttings.

The COURT.—He stated he was not selling the cuttings; and he stated that he had received requests from several people, a half a dozen or more each year, for cuttings and that he gave them away, two to each one who asked for them; that he would not sell them.

The WITNESS.—And, in addition to that, people—neighbors, who came on the vineyard and worked, if they wanted one or two cuttings to plant around the house and asked for it, I gave it to them.

The COURT.—Q. You never sold them?

A. Never sold them. I never sold any cuttings.

Mr. LOFTUS.—Q. In connection with those cuttings you did give away, however,—any of those people using this name “Lady Fingers” have done so without your license or consent?

A. Nobody has ever used that name “Lady Fingers” except two people and they have a special license from me, “Shipped under the supervision of A. B. Humphrey Company”; and when they bring the fruit and put it in my cars, I put that on. If they pick the fruit and take it to somebody else’s packing-house, they have to put some other name on there, and they understand that.

The COURT.—Q. And those two people are whom?

A. George Winkelman is one.

Q. And who is the other man?

(Testimony of A. B. Humphrey.)

A. H. W. Bartel, but that is under the name of H. J. Stevens. Mr. Bartel is his son-in-law. Mr. Stevens owned a vineyard opposite me and we shipped out fruit together for convenience.

Mr. LOFTUS.—Are you familiar with the recent catalogues put out by the Fancher Creek Nursery, which was formerly operated by George C. Roeding?

A. I saw them this morning. They were handed to me, but I have in the last—since this matter came up I have [110] looked in the catalogues to see if “Lady Fingers” was there.

Q. And how is the variety of grape that you found, the appearance similar to the “Lady Finger” variety listed in the recent catalogues of the Fancher Creek Nursery?

A. Well, it is a distinctly different variety. It is the Olivette Blanche. I could draw the 3 grapes very easily if I had a paper.

Q. Will you describe what the difference is between the Olivette Blanche, the White Cornichon, and the one which bears your trade-mark, “Lady Finger”? A. Yes.

Q. Describe that?

A. My grape is similar—I could draw it easily,—all 3 grapes side by side, if the Court thinks it is necessary.

The COURT.—I hardly think it is necessary. The only question here is whether, when you began to call your grapes the “Lady Finger” grapes, whether or not they were known as “Lady Finger”

(Testimony of A. B. Humphrey.)

grapes before that or not. It may be these other grapes, the Cornichon and others, were known as "Lady Finger" grapes long before you grew your grapes.

The WITNESS.—They were listed as "Cornichons" until after I began to advertise the "Lady Finger" grape. The "Lady Finger" grape is the most symmetrical grape of the three. It is the same shape at the stem end as at the bottom, rather square-shaped top and bottom. It gradually tapers at the stem end away to the center, a very slight taper, and there is on the other end a very slight taper toward the center.

The "Olivette Blanche," which has been designated now as "Lady Fingers," is a very wide grape at the top. When it grows perfectly it is always the shape of an ox heart. It is very wide at the top and comes to a point.

The "White Cornichon," all of my investigation leads me to think, is identical with the "Pizzutello di Roma." It is a grape [111] of Italian origin, grown largely around Rome, as near as I can find out, and it is the most misshaped grape of all three; and is the one that is called, often called, "Lady Fingers" in the last 6, 8 or 10 years. It is a one-sided grape. The stem is placed on one side at the top on the tip. One side is almost straight down. The other side bulges, with quite fine and decided cracks in the whole grape. It is a grape of comparatively poor quality as compared with "Lady Fingers," for the reason that it is tart and has

(Testimony of A. B. Humphrey.)

more seeds, which applies, also, to the "Olivette Blanche." It is a grape which never gets sufficient sugar to be a really palatable fruit.

Q. Are you familiar with the grape that is grown on the Carmelita Vineyard and which has been recently shipped and marketed as "Lady Fingers"?

A. I am. That is, I have had it called to my attention by my own agent.

Q. And have you seen the grape? A. I saw it.

Q. What type of grape is it?

A. It is an "Olivette Blanche." My agent in Los Angeles called me up, or, rather, called my attention to the fact—

Mr. CONLEY.—We submit this is hearsay and move to strike it out.

The COURT.—Describe it if you have seen it.

A. I have seen the grape.

Mr. LOFTUS.—Q. Well, is it the same as your "Lady Finger" grape?

A. No. It is an Olivette Blanche.

Mr. LOFTUS.—I offer this Fancher Creek Nursery Catalogue, 1927-1928, in evidence, with particular reference to page 10, showing the listing of that grape as the "Olivette Blanche."

Mr. CONLEY.—And it is also termed "Lady Finger," is it not? Is that so, Mr. Loftus?

Mr. LOFTUS.—In little script below that they have tried to make [112] it appear it resembles the "Lady Finger."

Mr. CONLEY.—Is that a statement of fact?

(Testimony of A. B. Humphrey.)

Mr. L O F T U S.—The heading is “Olivette Blanche.”

Mr. CONLEY.—I will submit this to the Court as to whether or not they have tried to make it anything, or as to whether or not they do make it appear as though it was “Lady Finger.”

(The catalogue was received in evidence, and marked Plaintiff’s Exhibit Number 7.)

The COURT.—(Referring to Exhibit 7.) The paragraph has the caption “Olivette Blanche,” the paragraph reading as follows: “Lady Finger. Berries are long or oblong tapering to a point on large conical bunches; skin thick, yellowish white; flesh firm, amber in color, juice, sweet and crackling. Season, September.”

Mr. LOFTUS.—Q. Does that describe the “Lady Finger” grape, Mr. Humphrey?

A. No.

Q. In what respect is it incorrect?

A. I don’t regard the “Lady Finger” grape as what you call “crackling,” which means when you put it in your mouth and bring your teeth down on it they split wide open. Oftentimes you imagine it makes a noise,—so full of meat, without a great deal of juice, that they split open when you bite them.

The COURT.—Q. What grape is that?

A. That is the Olivette Blanche. The “Lady Finger” grape has too much juice to do that. It has a firmer skin, although not as thick a skin, and the consequence being, as in the case of rains, the

(Testimony of A. B. Humphrey.)

Olivette Blanche will go to pieces with ordinary rain, whereas, the "Lady Finger" will not be affected by the same rain. This is because of the fact that the skin of the "Lady Finger" has a very close texture, like the skin of a toy balloon; it resembles the skin of a toy balloon, whereas the skin of the Olivette Blanche is thick, like the Tokay skin. And [113] the Tokay grapes and such grapes as that seem to absorb the rain, the moisture, to a greater extent, so that they are affected by the water more than the "Lady Finger" grape, although all grapes will be affected by continuous rains. We often, in the field, get a momentary rain, and some of these varieties, such as I have mentioned,—the Olivette Blanche, will often be past shipping where the other varieties, which has a skin that will resist the rain, will escape, and we can still continue to ship them. That is one outstanding characteristic of the "Lady Finger" grape. The "Lady Finger" grape, however, has a number of *characteristics from* any other grape. They taste sweet. The reason that the people notice that when they first eat them, that they taste sweet, and yet they don't really carry a great deal of sugar, as a matter of fact. The reason for that is that they carry less than half the acid of any other grape and, therefore, many people have told me they could eat that grape when they were unable to eat any other grape, because grape acid is not acceptable to a great many people's stomach. It also does not contain as much sugar as a good many other

(Testimony of A. B. Humphrey.)

grapes, and yet it tastes sweeter, because of the absence of the acid. "Lady Finger" grapes when they are perfect carry about 20 or 21 per cent sugar, with about 45 per mill acid. That is a term used by wine men to designate the acid content. The ordinary grape carries anywhere from 70, 80 or 85.

Mr. LOFTUS.—Q. Now, are you familiar with the requirements of this Standardization Act of 1927,—the California Fruit, Nut and Vegetable Standardization Act?

A. I am now, yes.

Q. Have you observed the markings on shipments of grapes by concerns other than the defendant Arkelian, which have met with the approval of this Act.

The COURT.—Is this proper rebuttal? [114]

Mr. LOFTUS.—Yes, your Honor, because the witness Arkelian testified that the only way he could mark these grapes was "Lady Fingers," and I wish to show by this witness that other people growing the same kind of grapes as the defendant Arkelian comply with the law by marking them otherwise.

The COURT.—Well, I suppose or presume that the reason he stated that, gave that testimony, is that that is the only name he knew them by and that that is the only name the Horticultural Commissioner knew them by in that county and he told him he would have to put that name on the boxes. I suppose Mr. Humphrey might not know that the people up in his neighborhood don't know that they

(Testimony of A. B. Humphrey.)

can ship these grapes up there under the name of "Lady Fingers" without naming them something else unless they ship through him, and two of them, at least, have conceded to his demands.

Mr. LOFTUS.—Q. In reference to shipments of white grapes in general, what marking would be sufficient to comply with these regulations or these requirements of the Standardization Act?

Mr. CONLEY.—We object to that on the ground that it is immaterial.

The COURT.—Objection sustained. It may be that it will be proper to mark a box of grapes "White Grapes." It may be that will comply with the law in one locality or in one part of the state but it may be that a commissioner or official somewhere else connected with the state government might refuse to permit a shipment to go that way and say to the shipper "These are commonly known as 'Lady Finger' grapes, and you mark them as 'Lady Finger' grapes or they don't go."

Mr. LOFTUS.—Q. Have you observed in your experience the use of the term just "White Grapes" as a marking for a variety of grapes?

Mr. CONLEY.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained. [115]

Mr. LOFTUS.—Q. Have you ever known of any objection being raised to white grapes being so marked?

The COURT.—There might be no objection in

(Testimony of A. B. Humphrey.)

his county at all. He might be able to ship grapes and give them any name.

Mr. LOFTUS.—This is a state act.

The COURT.—Yes. But he might call them white.

Mr. LOFTUS.—Merely white?

The COURT.—Sure, white grapes. He might mark them white grapes and they get by, while down in Fresno County you might have to put the name of what they are,—either “Lady Finger” grapes or whatever name the Horticultural Commissioner might tell you to put on them.

Mr. LOFTUS.—Q. Who passes on these questions as to the sufficiency of markings on grape boxes?

A. It emanates from the State Horticultural Commissioner on recommendations and goes to the Legislature.

The COURT.—Oh, I presume they have a man in every county and he inspects the shipments, does he not?

A. Well—

Q. Well, somebody does it? Doesn't somebody do it?

A. If there is any question raised the horticultural commissioner decides the matter.

Q. You put anything you want on the grapes, don't you?

A. If you want to comply with the law you do one, two or three things. The law says if you are not sure of the variety, “White Grapes” will be

(Testimony of A. B. Humphrey.)

sufficient to put on them and it lists the other grapes, most of the white grapes, under a special name.

Mr. LOFTUS.—Q. What is this “Rish Baba” grape that is listed in this same group?

A. It is a grape, as I understand from Professor Bioletti, an importation which he claims he identifies as the same grape to which I have given the name “Lady Finger.” As I said before, [116] Professor Bioletti claims that the “Rish Baba” grape is the same grape as the “Lady Finger.” He would like to have permission to come down to my place and make an investigation, he said. I gave him permission to come down there and do anything he wanted, but he came there when I was not there. He says, “I think I know your grape,” and I said, “I would be very pleased to have you come down to my place any time you want to,” but, as I say, he came there when I was not there and he afterwards told me, “I feel very sure it has all the characteristics of the ‘Rish Baba,’ and I feel sure the varieties are identical.” I said, “Be that as it may, I commenced naming the grape ‘Lady Finger’ 30 years ago, and I consider that is the name so far as I am concerned.”

Q. Have you observed the manner in which these grapes are displayed and sold by retail dealers?

Mr. CONLEY.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. LOFTUS.—This is in rebuttal.

(Testimony of A. B. Humphrey.)

The COURT.—That doesn't make any difference. It is all common knowledge. We have all passed by these fruit stores and fruit stands and can see how they are sold.

Mr. LOFTUS.—That is all.

Cross-examination.

Mr. CONLEY.—Q. You have told the Court now, as I understand it, that the name "Lady Finger" is applied to "Rish Babas," "Pizzutello di Roma" and "Olivette Blanche"?

A. I said in my experience I have known it to be.

Q. Yes. Known it to be? A. Yes.

Q. And how long have you known that to be the fact?

A. After my experience due to this competition.
[117]

Q. And how long ago was that?

A. I should say after I started out, after 3 years, and it kept getting worse and worse, why, I applied to my lawyers, I suppose, and had the name trade-marked.

Q. And you were informed at that time, were you not, that your grapes were "Rish Baba"?

A. I then applied for a trade-mark. I saw no other way to protect myself.

Q. I didn't ask you that. You have been told your grapes are, in fact, "Rish Baba" grapes and belong to that variety. Isn't that true?

A. Professor Bioletti says he considers it the same variety.

(Testimony of W. Flanders Setchel.)

Mr. CONLEY.—That is all.

(Witness excused.)

TESTIMONY OF W. FLANDERS SETCHEL,
FOR DEFENDANT (IN SURREBUTTAL).

Mr. CONLEY.—Q. Mr. Setchel, are you acquainted with the Frank H. Wilson place that is next to the Carmelita Vineyard?

A. Well, I was intimately acquainted with—

Mr. LOFTUS.—I can't see, if your Honor please, where this is surrebuttal. I haven't heard this name "Wilson" mentioned in the case at all.

Mr. CONLEY.—I will let you see it in a minute.

A. (Continuing.) I was intimately acquainted with the Frank H. Wilson place from 1916 to 1921.

Q. I will ask you if in that vineyard there is any acreage of "Lady Finger" grapes?

Mr. LOFTUS.—I object to that your Honor, and ask for a ruling on my objection.

The COURT.—Overruled.

Mr. LOFTUS.—Exception.

A. The Frank H. Wilson place adjoins the Carmelita Vineyard and we used to exchange our work a great deal, due to the water, the same water, and during those years I refer to I was on the Wilson [118] place three or four times a week. During that period there was about 30 acres of vines there, Mr. Conley. I do not know where the cuttings came from. I was intimately acquainted with and acquainted with the Roeding Nursery at the time and the Earl Fruit Company handled the grapes.

(Testimony of W. Flanders Setchel.)

Q. Do you know whether the Earl Fruit Company shipped any of those grapes at that time?

A. Yes, they did, and they handled them as "Lady Fingers," too.

Mr. CONLEY.—That is all.

Mr. LOFTUS.—Nothing.

(Witness excused.) [119]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a correct copy of the condensed trial record with testimony stated in narrative form as agreed upon by the parties.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Counsel for Plaintiff.

CONLEY, CONLEY & CONLEY,

W. M. CONLEY,

MATTHEW CONLEY,

Counsel for Defendants.

Dated: February 6th, 1929.

Approved:

A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Feb. 6, 1929. [120]

[Title of Court and Cause.]

PETITION FOR ORDER ALLOWING AP-
PEAL.

Plaintiff herein, A. B. Humphrey Company, a

corporation, feeling itself aggrieved by the decree made and entered in the above-entitled action on the 8th and 11th days of August, 1928, respectively, ordering that the above-entitled suit stand dismissed; that plaintiff take nothing by said suit; that the trade-mark of plaintiff, to wit "Lady Fingers," and Certificate of Registration issued by the United States Patent Office therefor, dated July 22, 1924, and numbered 186,739, are and each of these is void and of no force or effect; and, that defendants do have and recover from plaintiff their costs and disbursements incurred therein; and feeling itself aggrieved by the whole of said decree comes now by its solicitors and prays this Court for an order allowing the said plaintiff to prosecute an appeal from the said decree and from the whole thereof to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and for a further order fixing the amount of security which the said plaintiff shall furnish for costs upon said appeal, upon the furnishing of which the [121] certified transcript of the record and proceedings herein may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for Plaintiff.

Dated: November 8th, 1928.

[Endorsed]: Filed Nov. 8, 1928. [122]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the plaintiff herein, A. B. Humphrey Company, and specifies and assigns the following as the errors upon which it will rely on its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered on the 8th and 11th days of August, 1928, respectively, ordering that the above-entitled action stand dismissed; that plaintiff take nothing by said suit; that the trade-mark "Lady Fingers" and the Certificate of Registration issued by the United States Patent Office therefor, dated July 22, 1924, and numbered 186,739, are and each of them is void and of no force or effect; and that defendants do have and recover their costs and disbursements incurred therein; and that said decree is erroneous and unjust to the plaintiff, because:

1. The above-entitled court erred in dismissing the bill of complaint herein with costs to defendants.

2. The Court erred in not granting the relief prayed for in the bill of complaint.

3. The Court erred in not finding the issues herein in favor of the plaintiff with costs against the defendants. [123]

4. The Court erred in ordering, adjudging and decreeing that plaintiff is not entitled to any relief whatever.

5. The Court erred in ordering, adjudging and

decreeing that the trade-mark "Lady Fingers" is void and of no force or effect.

6. The Court erred in ordering, adjudging and decreeing that U. S. Certificate of Trade-mark Registration No. 186,739, issued July 22, 1924, by the Commissioner of Patents, United States Patent Office, for the name "Lady Fingers" is void and of no force or effect.

7. The Court erred in failing to find the trade-mark "Lady Fingers" as applied to grapes was good and valid and was the sole and exclusive property of plaintiff herein.

8. The Court erred in failing to find that the evidence presented by defendants was insufficient to overcome the presumption of validity of a trade-mark duly and regularly registered according to law.

9. The Court erred in failing to find that plaintiff's predecessor in interest, Mr. A. B. Humphrey, was the first to adopt and use the name "Lady Fingers" in connection with grapes, and that the same had never been abandoned.

10. The Court erred in failing to find that plaintiff's trade-mark "Lady Fingers" had been infringed by defendants herein.

CHAS. E. TOWNSEND,
WM. A. LOFTUS,

Attorneys for Plaintiff.

Dated: November 8th, 1928.

[Endorsed]: Filed Nov. 8, 1928. [124]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

In the above-entitled cause, plaintiff having filed its petition for an order allowing an appeal, together with an assignment of errors,—

Now, upon motion of Messrs. Chas. E. Townsend and Wm. A. Loftus, attorneys for plaintiff, it is

ORDERED that the said appeal be and the same is hereby allowed to said plaintiff to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered on the 8th and 11th days of August, 1928, respectively, and from the whole thereof; that the amount of plaintiff's cost bond be and the same is hereby fixed at the sum of Two Hundred Fifty Dollars (\$250.00).

IT IS FURTHER ORDERED that upon the giving of such cost bond a certified transcript of the record and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

A. F. ST. SURE,
United States District Judge.

Dated: November 8, 1928.

[Endorsed]: Filed Nov. 8, 1928. [125]

[Title of Court and Cause.]

COST BOND ON APPEAL.

WHEREAS, the plaintiff in the above-entitled action has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree in favor of the above-named defendant made and entered the 8th and 11th days of August, 1928, respectively, in the above-entitled action by the District Court of the United States for the Northern District of California, praying that the said decree may be reversed,—

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned The Fidelity and Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the appellant that said appellant will prosecute his appeal to effect and will answer all damages and cost if he fails to make his plea good, not exceeding Two Hundred and Fifty Dollars (\$250.00), to which amount it acknowledges itself bound. In case of a breach of any condition thereof, said District Court of the United States for the Northern District of California may upon notice to them of not less than ten days proceed summarily in the action, suit, case or proceeding in which the same was given to ascertain the amount which such sureties are bound to pay on account of

such breach, and render judgment against them, and award execution therefore.

IN WITNESS WHEREOF, the said surety has caused these [126] to be executed and its official seal attached by its duly authorized agent at San Francisco, California, the nineteenth day of November, A. D. 1928.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

By W. L. DAWSON.

Approved this 20th day of November, 1928.

A. F. ST. SURE,
U. S. District Judge. [127]

State of California,
City and County of San Francisco,

On this 19th day of November, in the year one thousand nine hundred and twenty-eight, before me, Kathryn E. Stone, a notary public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. L. Dawson, known to me to be the Attorney of the Fidelity and Casualty Company of New York, the corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the County

of San Francisco the day and year in this certificate first above written.

[Notary Seal] KATHRYN E. STONE,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 1st, 1929.

[Endorsed]: Filed November 20, 1928. [128]

[Title of Court and Cause.]

ORDER TO SEND ORIGINAL EXHIBITS TO
CIRCUIT COURT OF APPEALS.

A. B. Humphrey Company, a corporation, plaintiff above named, having appealed to the Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court for the Northern District of California, in the above-entitled cause,—

NOW, THEREFORE, IT IS ORDERED that all of the exhibits in the above-entitled cause be forwarded by the Clerk of the District Court above named to the Clerk of the Circuit Court of Appeals.

A. F. ST. SURE,

United States District Judge.

Dated: January 23d, 1929.

[Endorsed]: Filed Jan. 23, 1929. [129]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of the United States District Court:

Sir: Please incorporate the following papers, documents and exhibits in the transcript of record on appeal in the above-entitled cause, omitting title of court and cause and omitting copying of all documentary exhibits as specified below:

1. Bill of complaint.
2. Answer to bill of complaint.
3. Amendment to answer.
4. Interrogatories filed by plaintiff October 28, 1927.
5. Answers to interrogatories filed November 5, 1927.
6. Order dismissing bill, dated July 16, 1928.
7. Decree filed and entered August 11, 1928.
8. Petition for order allowing appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Citation on appeal.
12. Bond on appeal. [130]
13. Statement of evidence under Equity Rule 75.
14. Order forwarding original exhibits.
15. Clerk's certificate for transcript.
16. Stipulation extending time within which to prepare and present for settlement the evidence under Equity Rule 75.

17. This praecipe.

Very respectfully,
CHAS. E. TOWNSEND,
WM. A. LOFTUS,

Attorneys for Plaintiff and Appellant.

Dated: January 23d, 1929.

[Endorsed]: Filed Jan. 23, 1929. [131]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 131 pages, numbered from 1 to 131, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$——; that the said amount was paid by the plaintiff and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 8th day of February, A. D. 1926.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [132]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Ben H. Arkelian and Ben H. Arkelian & Co., GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein A. B. Humphrey Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ADOLPHUS F. ST. SURE, United States District Judge for the Northern District of California, this 8 day of November, A. D. 1928.

A. F. ST. SURE,
United States District Judge. [133]

United States of America,—ss.

On this 20th day of November, in the year of our Lord one thousand nine hundred and twenty-eight, personally appeared before me, Thos. G. Goulden,

the subscriber, and makes oath that he delivered a true copy of the within citation to Messrs. Conley, Conley & Conley, by depositing same in the U. S. mails properly addressed to the office of the above-named attorneys at Fresno, California, postage prepaid, on November 8th, 1928.

THOS. G. GOULDEN.

Subscribed and sworn to before me at San Francisco, this 20th day of November, A. D. 1928.

[Seal]

FRANK H. SCHMID,

Deputy Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Citation on Appeal. Filed Nov. 20, 1928.

[Endorsed]: No. 5715. United States Circuit Court of Appeals for the Ninth Circuit. *A. B. Humphrey Company*, a Corporation, Appellant, vs. *Ben H. Arkelian* and *Ben H. Arkelian & Co.*, a Copartnership, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 8, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.